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## How Do You Say “Big Media” in Spanish? Spanish-Language Media Regulation and the Implications of the Univision-Hispanic Broadcasting Merger on the Public Interest

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### Cover Page Footnote

Prof. Thomas Lee; Commissioner Jonathan Adelstein, Johanna Mikes-Shelton, Barry Ohlson, Scott Bergmann, and Lisa Zaina, Scott Simon, Clinton Cargill and Alexis Rehrmann.

# How Do You Say “Big Media” in Spanish? Spanish-Language Media Regulation and the Implications of the Univision-Hispanic Broadcasting Merger on the Public Interest

Nicole Serratore\*

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## INTRODUCTION

- At 38.8 million,<sup>1</sup> the U.S. Hispanic population is already larger than the entire population of Canada.<sup>2</sup>
- Univision concedes “that there is no company as dominant in English-language media as Univision is in Spanish.”<sup>3</sup>
- “[T]he Communications Act prohibits [the FCC] from ‘granting a monopoly in the field of broadcasting,’ and [it is] directed instead to serve the ‘public interest’ by ‘assuring fair opportunity for open competition in the use of broadcasting facilities.’”<sup>4</sup>

In reviewing media mergers, the Federal Communications Commission (“FCC” or “Commission”) has long recognized the dangers of media consolidation and its negative effects on competition, localism and diversity. However, in approving Univision’s request to combine its Spanish-language television assets with Hispanic Broadcasting Corporation’s (“HBC”) radio assets (“Univision merger”), it has permitted a Spanish-media giant to form. Although the combined entity does not command a monopoly in the broad national market, and affects only Spanish-speaking audiences, the new entity dominates the U.S. Spanish-language market, dwarfing all competitors.

This Note argues that the FCC failed in its regulatory duty to serve the public interest by granting the merger. To properly achieve the public interest goals of competition, localism and diversity, the FCC should have considered language as a factor in defining the media market affected by the Univision merger. A

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<sup>1</sup> Haya El Nasser, *39 Million Make Hispanics Largest U.S. Minority Group*, USA TODAY, June 19, 2003, at A1. The Census has used the term “Hispanic” to designate the Spanish-speaking population in the United States, so I have chosen to do so as well. Johnny Diaz, *Latino? Hispanic? Which Is It? Spanish Speakers Are Divided and Often Confused*, BOSTON GLOBE, Jan. 25, 2004, at 1.

<sup>2</sup> Entravision Commun. Corp., *U.S. Hispanic Market*, at <http://www.entravision.com/template.cfm?page=hispanics> (last visited Oct. 8, 2004).

<sup>3</sup> Mireya Navarro, *As Univision Looks to Buy Into Radio*, N.Y. TIMES (June 23, 2003) at C8.

<sup>4</sup> 2002 Biennial Regulatory Review, 18 F.C.C.R. 13620, ¶ 54, at 13637–38 (proposed June 2, 2003) (citing *U.S. v. Storer Broad. Co.*, 351 U.S. 192, 203 (1956)) [hereinafter Biennial Review 2002].

market definition based on language would have been consistent with Commission precedent. Had the FCC acknowledged that language plays a part in the diversification of voices in media ownership, the merger decision would have been different. The adverse consequences of the FCC's failure will only become more apparent as America's Hispanic population grows. The FCC cannot ignore that this population will be severely impacted by the merger.

This Note has three parts. Part I.A provides a legal framework for the FCC's review of broadcast license transfers through the broadcast ownership rules, which inform its assessment of media mergers. Part I.B traces the evolution of the FCC's foreign-language media regulation, including examples of cases in which the FCC used language as a determinative factor in its decision. Part I.C describes the current marketplace of Spanish-language television and radio entities and how Spanish-language audiences use these media outlets. Part II recounts how the FCC and the Department of Justice reviewed the Univision merger. Despite the Justice Department's finding that Spanish-language radio does not compete with English-language radio, the FCC proceeded with a market definition excluding language. Part III demonstrates that the FCC's approval of the Univision merger did not advance the public interest in competition, localism and diversity. This Note concludes that Spanish-language media is a discrete media market, a distinction that federal regulation should fully recognize.

## I. FEDERAL REGULATION OF MEDIA

Part I will detail the FCC's methods for reviewing media mergers and the unique history of foreign-language media regulation. Part I.A will illustrate the scope of the FCC's authority to regulate media mergers through the broadcast ownership rules and will define the statutory mandate that mergers benefit the public interest. "The public interest" is a term of art that has long been the governing principle of FCC regulation, despite its opaque meaning. Since mergers often implicate antitrust laws, Part I.A will also detail the parallel competition reviews carried out by the Department of Justice and the Federal Trade Commission. Part I.B

will demonstrate the use of language as a determinative factor in prior FCC decisions. Part I.C will show how Spanish-language media is used in America today and which corporate players define the broadcast arena.

*A. How the FCC Reviews Media Mergers*

The FCC reviews media mergers by the authority granted to oversee broadcast licenses in the Communications Act of 1934.<sup>5</sup> When applying for a license, a broadcaster must meet “citizenship, character, and financial, technical and other qualifications . . . to operate the station.”<sup>6</sup> Even if the license applicant meets the basic criteria, the FCC must determine whether the applicant meets certain qualitative standards and if granting the license “would best serve the public interest.”<sup>7</sup> Since broadcast licenses are limited in supply, mergers are accomplished by broadcast properties changing hands through license transfers.<sup>8</sup> If a television broadcaster attempted to merge with a radio broadcaster, the FCC would focus its review on the transfer of licenses between the parties. License transfers are permissible only when the Commission finds that the “public interest, convenience, and necessity will be served” by this action.<sup>9</sup> Since the responsibility to serve the public interest is the crux of the FCC’s duty in broadcast licensing (and therefore media mergers), it is critical to understand how the public interest has been defined by courts.

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<sup>5</sup> KENNETH CREECH, *ELECTRONIC MEDIA LAW AND REGULATION* 130, 135 (4th ed. 2003) (noting the process and requirements under the Communications Act of 1934 for how to obtain a broadcast license and the FCC’s jurisdiction over sales of licenses).

<sup>6</sup> 47 U.S.C. § 308(b) (2004).

<sup>7</sup> DONALD E. LIVELY, *ESSENTIAL PRINCIPLES OF COMMUNICATIONS LAW* 151 (1992).

<sup>8</sup> CREECH, *supra* note 5, at 130 (stating that sales of broadcast licenses for existing facilities are more common).

<sup>9</sup> 47 U.S.C. § 310(d) (2004). In general, license transfers are governed by the same standard as new applications or license renewals, but there are additional considerations that the FCC will review in transfers alone. LIVELY, *supra* note 7, at 173. The FCC has regulations for the frequency of transfers, requiring the broadcaster to hold the license for a specific waiting period before transferring ownership to another. *Id.*

### 1. The Public Interest

What constitutes “the public interest” has long been debated<sup>10</sup>—a battle complicated by shifting meanings of the phrase in different contexts and at different times in history. However, the FCC’s ability to regulate in “the public interest” in broadcast licensing was first given power and import in the 1943 case, *NBC v. United States*.<sup>11</sup> NBC argued that the FCC’s regulatory authority was limited only to “technical and engineering” matters and that the FCC did not have the authority to implement competition-based, broadcasting regulations over the national radio networks.<sup>12</sup> The Supreme Court held that the FCC was more than “a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other.”<sup>13</sup> In the Court’s view, the Commission “was given a comprehensive mandate to ‘encourage the larger and more effective use of radio in the public interest.’”<sup>14</sup> This case confirmed that the Commission had broad, congressionally-authorized power to regulate the broadcast spectrum.<sup>15</sup>

Since *NBC*, the FCC has focused its broadcast regulation on three areas it determined to be central to the public interest: diversity, competition, and localism.<sup>16</sup> Since media regulation

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<sup>10</sup> See 3 HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW § 14.1, at 115–17 (West Prac. ed. 1999 & Supp. 2003) (noting that the public interest standard adopted into the Communications Act was “borrowed” from the Transportation Act of 1920 relating to railroad regulation and since that time has been debated as to its meaning).

<sup>11</sup> T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FIFTH ESTATE, REGULATION OF ELECTRONIC MASS MEDIA 71 (5th ed. 1999).

<sup>12</sup> *Id.* The FCC was concerned that national radio networks had too much control over the industry and local programming, therefore the FCC created the chain broadcasting rules to govern the relationship between the local affiliated radio stations and the radio networks. *Id.* at 71, 666. The rules were in place until 1977 when it was determined that with the amount of existing competition they were no longer necessary in radio. *Id.* at 668.

<sup>13</sup> *NBC v. U.S.*, 319 U.S. 190, 215–16 (1943).

<sup>14</sup> *Id.* at 219 (quoting 47 U.S.C. § 303(g)(i) (1943)).

<sup>15</sup> *Id.* at 219 (suggesting that the Communications Act granted the Commission expansive powers).

<sup>16</sup> Press Release, FCC, FCC Sets Limits on Media Concentration (June 2, 2003), [http://hraunfoss.fcc.gov/edocs\\_public](http://hraunfoss.fcc.gov/edocs_public) (last visited Oct. 8, 2004).



seeks to “promote First Amendment interests of consumers”<sup>17</sup> and the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,”<sup>18</sup> diversity can be achieved through rules that “encourage diversity in the ownership of broadcast stations, which can in turn encourage a diversity of viewpoints in the material presented over the airwaves.”<sup>19</sup> Diversity of viewpoints and sources “plac[es] into many, rather than a few hands, the control of this powerful medium of public communication.”<sup>20</sup> Such diversification also augments competition since it “prevent[s] undue concentration of economic power.”<sup>21</sup> Through the allotment of spectrum to local communities, the FCC assured that “good broadcasting” would develop all over the country such that New York and Chicago stations would not dominate the media.<sup>22</sup> Broadcasters would fulfill this goal of localism by serving “the programming and advertising needs of the local community.”<sup>23</sup> The Court in *NBC* stated that “[l]ocal program service is a vital part of community life,”<sup>24</sup> and today it remains a key goal upheld by courts, Congress

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<sup>17</sup> 2002 Biennial Regulatory Review, 17 F.C.C.R. 18503, ¶ 30, at 18515 (proposed Sept. 12, 2002) [hereinafter Biennial Review 2002 NPRM].

<sup>18</sup> Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, 16 F.C.C.R. 19861, ¶ 5, at 19863 (proposed Nov. 8, 2001) (citing Amendment of Sections 73.35, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Report and Order, 45 F.C.C. 1476, ¶ 3, at 1477 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945))).

<sup>19</sup> Biennial Review 2002 NPRM, *supra* note 17, ¶ 30, at 18515.

<sup>20</sup> Amendment of Sections 73.35, 73.240, and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 22 F.C.C.2d 206, 310 (1970).

<sup>21</sup> *FCC v. NCCB*, 436 U.S. 775, 780 (1978).

<sup>22</sup> Biennial Review 2002, *supra* note 4, ¶ 74, at 13643.

<sup>23</sup> Gregory Prindle, Note, *No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 290 (2003) (describing the localism as expressed by the Court and Commission in the *NBC* case). One of the concerns raised in the *NBC* case was that local broadcasting could suffer if a high percentage of a station’s programming came from a national source. *Id.*

<sup>24</sup> Biennial Review 2002, *supra* note 4, ¶ 76 at 13644 (quoting *NBC v. United States*, 319 U.S. 190, 203 (1943)).

and the Commission.<sup>25</sup> As a result, the broadcast ownership rules promulgated by the Commission, including those issued as recently as 2003, remain premised on these central and historic principles of competition, localism and diversity.<sup>26</sup>

## 2. Broadcast Ownership Rules

The FCC regulates broadcast ownership because “broadcasters are essentially trustees of the public’s airwaves [and] government is the guardian of the public’s interests.”<sup>27</sup> Ownership, therefore, is central to broadcasters’ use of the “public’s airwaves” which the FCC must oversee.<sup>28</sup> From its earliest days, the FCC developed a regulatory scheme for ownership according to its public interest mandate (focused on competition, localism and diversity). It established rules which defined specific limits to the number of broadcast entities one can own on a national and local level<sup>29</sup> to maintain competition, localism and diversity in broadcast ownership. As a corollary, the FCC can deny a license transfer if the resultant merged entity would violate these ownership limits<sup>30</sup> because the transfer would be contrary to the public interest.<sup>31</sup> Although the initial broadcast ownership rules focused on discrete media ownership (such as those embodied by the local television multiple ownership, local radio ownership, national television ownership, and dual television network rules),<sup>32</sup> the FCC later developed cross-ownership holding limits between radio, broadcast television, cable television, and newspapers.<sup>33</sup> With the passage of

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<sup>25</sup> *Id.* ¶¶ 73, 75, at 13643–44.

<sup>26</sup> *Id.* ¶ 131, at 13677.

<sup>27</sup> Krystilyn Corbett, *The Rise Of Private Property Rights In The Broadcast Spectrum*, 46 DUKE L.J. 611, 613 (1996).

<sup>28</sup> *Id.*

<sup>29</sup> 3 ZUCKMAN ET AL., *supra* note 10, § 14.4, at 150 (discussing local ownership/duopoly and national ownership limits).

<sup>30</sup> *See id.* § 14.6 at 220 (noting that the FCC can control licensing through hearings when licensees do not comply with FCC rules).

<sup>31</sup> PETER W. HUBER ET AL., *FEDERAL TELECOMMUNICATIONS LAW* § 7.5, at 624 (2d ed. 1999 & Supp. 2003).

<sup>32</sup> FCC, *FCC’s Review of Broadcast Ownership Rules*, <http://www.fcc.gov/cgb/consumerfacts/reviewrules.html> (last visited Nov. 4, 2004).

<sup>33</sup> 3 ZUCKMAN ET AL., *supra* note 10, § 14.4, at 155–59. Cross-ownership raised many of the same diversity issues that common ownership of broadcast stations raised. *Id.* at

the Telecommunications Act of 1996 (“Telecom Act”)<sup>34</sup>, Congress began requiring the FCC to review these ownership limits biennially to determine whether they remain necessary and in the public interest.<sup>35</sup> The FCC issued new broadcast ownership rules in 2003 through the 2002 biennial review.<sup>36</sup>

The longtime goals of competition, diversity and localism were upheld in the 2002 biennial review. The FCC recognized there was still a need for competition review when license transfers occurred.<sup>37</sup> It decided to use audience share as a gauge of competition in some circumstances, and in certain discrete markets to use competition in advertising markets as the measurement governing whether competition existed between companies.<sup>38</sup> Either way, the FCC committed itself to assess the competitive harm wrought on the public and not the merger’s effect on broadcasters or advertisers.<sup>39</sup> The FCC determined that viewpoint diversity was still a critical goal<sup>40</sup> and the best way to measure it was through news and public affairs programming.<sup>41</sup> Viewpoint diversity included broadcast television, radio, cable and the internet. Program diversity, including programming aimed at “minority and ethnic groups,” was important to broadcast ownership regulation, but the FCC argued that this would best be achieved by competition between media outlets rather than through

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156. When the cross-ownership rules were put in place, “[ninety-four] television stations were owned in common with daily newspapers serving the same broadcast community,” which the FCC did not believe represented diversity of voices. *Id.* at 155–56.

<sup>34</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, §502, 110 Stat. 133 (codified at 47 U.S.C. § 561) (2004).

<sup>35</sup> 2 ZUCKMAN ET AL., *supra* note 10, § 9.3, at 347.

<sup>36</sup> Biennial Review 2002, *supra* note 22. The Commission reaffirmed their commitment to competition, localism and diversity in the 2002 biennial review. *Id.* ¶ 5, at 13623. The rules however were initially stayed by court action. *Prometheus Radio Project v. FCC*, 2003 U.S. App. LEXIS 18390, at \*\*3–4 (3d Cir. 2003). Since then, they have been remanded in part to the Commission. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 382 (3d Cir. 2004). Congress has since amended the Telecom Act to provide for quadrennial review of the ownership rules. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 100 (2004).

<sup>37</sup> Biennial Review 2002, *supra* note 4, ¶ 56 at 13368.

<sup>38</sup> *Id.* ¶ 64, at 13641.

<sup>39</sup> *Id.* ¶ 65, at 13641.

<sup>40</sup> *Id.* ¶ 27, at 13630.

<sup>41</sup> *Id.* ¶ 32, at 13631.

government regulation.<sup>42</sup> Localism remained an important goal and would be measured by “selection of programming responsive to local needs and interests, and local news quality and quantity.”<sup>43</sup>

However before the new rules could go into effect, they were challenged in court and the Third Circuit ordered a stay of judgment.<sup>44</sup> Several consumer advocacy groups and broadcaster associations petitioned for judicial review of the new rules.<sup>45</sup> In *Prometheus Radio Project v. FCC*, the Third Circuit agreed that the rules promulgated under the 2002 biennial review were problematic.<sup>46</sup> The rules were in part remanded to the Commission<sup>47</sup> and the stay of judgment remains in effect until the court reviews the FCC’s action on remand.<sup>48</sup> As a result, the new rules have not yet gone into effect and the Third Circuit undermined many of the new policy arguments espoused by the FCC in the 2002 biennial review.

### 3. Competition and Antitrust

Even though the rules are in flux, the Commission’s public interest review still involves competition matters which also implicates antitrust laws. Consequently, there is some overlap between the FCC’s authority in this regard and those of other executive and independent agencies, which hold more general oversight in antitrust matters. Sometimes a merger that is permissible under antitrust laws may not be permissible when the FCC considers the public interest.<sup>49</sup> Multiple agency review of

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<sup>42</sup> *Id.* ¶ 36, at 13631.

<sup>43</sup> *Id.* ¶ 78, at 13644.

<sup>44</sup> *Prometheus Radio Project v. FCC*, 2003 U.S. App. LEXIS 18390, at \*\*3–4 (3d Cir. 2003).

<sup>45</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 381–82 (3d Cir. 2004).

<sup>46</sup> *Id.* at 397.

<sup>47</sup> The remand was premised on the grounds that the Commission made “an unjustified assumption that media outlets of same type make an equal contribution to diversity and competition in local markets” and “its decision to count the Internet as a source of viewpoint diversity, while discounting cable, was not rational.” *Id.* at 435, 405.

<sup>48</sup> *Id.* at 435.

<sup>49</sup> Cavanagh, *infra* note 53, at 71 (noting that traditionally the FCC broadcast ownership rules were more restrictive in radio than antitrust but with the relaxing of radio rules in the Telecom Act, antitrust does again play an important role); see also James Rowley & Katherine Reynolds Lewis, *NBC Clears FTC Antitrust Hurdle to Buy*

media mergers is often necessary and even advantageous as the Supreme Court recently noted that FCC regulation can work in tandem with antitrust enforcement to benefit overall competition.<sup>50</sup> Since FCC regulations establish a baseline for competition in a market, broadcasters would not bother to attempt a merger and seek antitrust review when they are in violation of FCC ownership regulations.

The Department of Justice ("DOJ") or the Federal Trade Commission ("FTC") will review mergers through their antitrust and competition mandates, respectively,<sup>51</sup> but their reviews are limited. DOJ merger reviews focus only on economic factors<sup>52</sup> including "market concentration, market conditions, the acquiring firm's entry advantage, market share of the acquired firm, and efficiencies."<sup>53</sup> The DOJ is "required to approve mergers unless they substantially lessen competition."<sup>54</sup> The FTC can take non-economic factors into consideration and "act[ing] as a 'court of equity' . . . disapprove a merger based on public policy grounds."<sup>55</sup> However, antitrust agencies will only review large media

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*Telemundo TV: Network Still Must Obtain FCC Approval for Purchase of the Spanish-Language Broadcaster*, L.A. TIMES, Nov. 21, 2001, § 3, at 11.

<sup>50</sup> Verizon Communications v. Law Offices of Curtis V. Trinko, 124 S. Ct. 872, 881 (2004).

<sup>51</sup> CREECH, *supra* note 5, at 376. In 2002, the FTC and DOJ planned to establish clear guidelines for reviewing mergers, but abandoned the effort when Congress expressed opposition. ROBERT PITOFKY ET AL., TRADE REGULATION 84-85 (Found. Press 2003).

<sup>52</sup> Mike Harrington, Note, *A-B-C, See You Real Soon: Broadcast Media Mergers and Ensuring a "Diversity of Voices,"* 38 B.C. L. REV. 497, 539 (1997).

<sup>53</sup> Sarah Elizabeth Leeper, *The Game of Radiopoly: An Antitrust Perspective of Consolidation in the Radio Industry*, 52 FED. COMM. L.J. 473, 478 (2000) (noting the economic factors the DOJ Horizontal Merger Guidelines address). The DOJ uses the Horizontal Merger Guidelines, which requires defining the "relevant product and geographic markets" at issue, to govern its analysis of radio mergers. Edward D. Cavanagh, *Symposium: Are New Media Really Replacing Old Media? Broadcast Media Deregulation and the Internet: Deregulation of the Air Waves: Is Antitrust Enough?*, 17 ST. JOHN'S J. LEGAL COMMENT. 67, 72 (2003). Once the markets are defined, the DOJ seeks to determine the likely competitive effects of the merger. *Id.* at 72. With radio mergers, the DOJ concentrates its inquiry into whether the proposed merger will "lead to increased prices for radio advertising." See also Part II.A. But see text accompanying note 246 (noting relevant product market for Univision merger was *Spanish-language* radio advertising).

<sup>54</sup> HUBER ET AL., *supra* note 31, at 603 (quoting Worldcom, 13 F.C.C.R. 18025, ¶ 14, at 18034-35 (1998)).

<sup>55</sup> Harrington, *supra* note 52, at 539.

mergers.<sup>56</sup> Therefore some license transfers may not receive any antitrust scrutiny at all.<sup>57</sup> Regardless of the merger's size, the FCC will ensure the license transfer meets the goals of diversity, localism and competition.<sup>58</sup> One court expressed its concern that if license transfers were left to antitrust agencies alone, eighty-five percent of media mergers since 2000 would not have been reviewed by anyone.<sup>59</sup> But since the FCC makes a public interest inquiry these smaller (but no less critical) mergers were examined.<sup>60</sup>

Since the FCC is concerned with the merger being in the public interest and thereby promoting competition and diversity,<sup>61</sup> it will take into consideration antitrust principles in its competitive analysis "but it is not governed by the scope of the antitrust laws."<sup>62</sup> The FCC's review process is also open and subject to public examination. The FCC must present a well-reasoned public record of its decision<sup>63</sup> and must also respond to petitions to deny, filed by members of the public, that raise "specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with [the public interest]."<sup>64</sup> As a result, the FCC must approach each license transfer taking into consideration public suggestions and comments.

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<sup>56</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 414 (3d Cir. 2004) (noting that the DOJ and FTC require notice of a merger only if "the transaction exceeds \$200 million or if the assets of one party exceed \$10 million and the assets of the other party exceed \$100 million").

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Leeper, *supra* note 53 at 477.

<sup>62</sup> HUBER ET AL., *supra* note 31, at 624 (quoting *Teleport/AT&T*, 13 F.C.C.R. at 15, 243-15, 244 ¶ 12 (citing *FCC v. RCA Communications, Inc.* 346 U.S. 86, 94 (1953); *United States v. FCC*, 652 F.2d 72, 81-82, 88 (1980))).

<sup>63</sup> HUBER ET AL., *supra* note 31, at 145-46 n.91. The DOJ and FTC can operate their investigations "largely hidden from the public view" and their decisions do not require substantive explanation. *Id.*

<sup>64</sup> *Telemundo Communications Group*, 17 F.C.C.R. 6958, ¶ 7, 6962 (2002) (quoting *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985) (citing 47 U.S.C. § 309(d)(1) (1982))).

### *B. Foreign-Language Media Regulation*

From the earliest days of the Federal Radio Commission, the predecessor agency to the FCC, foreign-language media has drawn the attention of government regulators.<sup>65</sup> Part I.B will demonstrate that throughout the Commission's history foreign-language media has been treated differently from English-language due to unique language-driven concerns. This part will show that the FCC has often used language as a factor in making its decisions, whether the rulings involve the program format of a radio station, approval of media mergers, or the granting of special privileges to Spanish-language broadcasters. The FCC's record proves that language has been used as a determinative tool to ensure that broadcasters serve the public interest.

#### 1. Community Need as a Public Interest Priority

The FCC has charged broadcasters with the mission to serve their local communities, a goal broadcasters have leveraged to provide foreign-language programming to local foreign-language audiences.<sup>66</sup> The Commission has in turn recognized language as a factor that can determine a community's need for foreign-language broadcasting.<sup>67</sup>

The FCC noted that in a 1931 decision called the *Brooklyn Cases*<sup>68</sup> the Radio Commission had approved of the meritorious practice of "the broadcast of foreign language programs where they were designed to educate and instruct the foreign populace among its listening public in the principles and ideals of our Government and American institutions."<sup>69</sup> Early on, the FCC accepted that the "specialized nature" of foreign-language programming could serve the public interest if "(a) a need for such

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<sup>65</sup> Michael E. Lewyn, *When is Time Brokerage A Transfer of Control? The FCC's Regulation of Local Marketing Agreements and the Need for Rulemaking*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 9–10 (1995) (noting that "brokered foreign language programs were common in large markets before the 1934 Communications Act").

<sup>66</sup> See generally Part I.B.1.

<sup>67</sup> See generally Part I.B.1.

<sup>68</sup> U.S. Broad. Corp. (WARD), 2 F.C.C. 208 n.1 (1936) [hereinafter *Brooklyn Cases I*]. The dispute involved four radio stations in Brooklyn, NY in 1932. *Id.* at 213.

<sup>69</sup> *Id.* at 223 (citing application of WJKS).

service was shown to exist, and (b) the programming proposed was designed for the purpose of meeting the unfulfilled need.”<sup>70</sup> What constituted suitable foreign-language programming in the public interest was based on several factors:

[First, what] percentage of the population to be served . . . can be expected to comprehend the foreign tongue[; second, what] percentage of the station’s total programming [will] be devoted to foreign languages[; third the control the licensee] exert[s] over the content of the foreign-language programs[; fourth,] the number of other radio and television services available in the area.<sup>71</sup>

The FCC used this formula in the seminal 1965 *La Fiesta* proceeding when faced with a choice between two proposed Spanish-language stations in a Texas community.<sup>72</sup> A pair of broadcasters were vying for a license in Lubbock, Texas: *La Fiesta* proposed a full-time Spanish-language broadcast service, whereas *Mid-Cities* proposed a part-time Spanish-language service.<sup>73</sup> To determine community need, the FCC looked to census statistics on the Spanish-surnamed population in the area.<sup>74</sup> The FCC also took testimony from people in “public health, welfare, education, religion and government” who worked closely with the local Latino population.<sup>75</sup> From these local experts, the Commission determined that “English language broadcasts on matters relating to civic affairs, voting and news [were] less effective than programs broadcast in Spanish” for this community.<sup>76</sup> No other radio stations served the Spanish-language community at the time.<sup>77</sup> *Mid-Cities* had proposed religious, agricultural and black

<sup>70</sup> *Earnest & Flache*, 6 F.C.C.2d. 65, ¶ 5, 67 (1965).

<sup>71</sup> *Great Lakes Television Inc.*, 25 F.C.C. 470, ¶ 54, at 526 (1958).

<sup>72</sup> *Earnest & Flache*, 6 F.C.C.2d. 65, ¶¶ 1–2, at 65–66 (1965). Two mutually-exclusive applicants sought to build a radio station in Lubbock, TX and the FCC conducted a comparative hearing to determine which proposed service would best serve the public interest, necessity and convenience. *Id.* ¶ 1, at 65.

<sup>73</sup> *Id.* ¶ 1, at 65.

<sup>74</sup> *Id.* ¶ 7, at 69.

<sup>75</sup> *Id.* ¶ 8, at 68–69.

<sup>76</sup> *Id.* ¶ 8, at 69.

<sup>77</sup> *Id.* ¶ 10, at 70.



programming with the part-time Spanish programming.<sup>78</sup> While there appeared to be a need for additional programming towards the black community, the Commission found sufficient alternative offerings for religious programming and no critical need for agricultural programming.<sup>79</sup> In the end, the FCC favored the full-time programming for the Spanish-language community since the language barrier otherwise deprived them of accessing any broadcast programming in the area.<sup>80</sup> Thus, the full-time Spanish programming would “better serve the public interest.”<sup>81</sup> This FCC decision demonstrated that foreign-language programming could be found in the public interest where there was community need.

Though the FCC created a formula to weigh community need, it lacked “a guiding statement of general policy” towards the merits of foreign-language programming overall.<sup>82</sup> The FCC had made “local self-expression” and “service to minority groups” public interest broadcasting priorities.<sup>83</sup> The FCC claimed that local foreign-language community need was inherent in its goal of “service to minority groups,”<sup>84</sup> but there existed no separate and distinct policy to oversee foreign-language broadcasting.

## 2. Program Format Disputes

The FCC’s failure to establish a foreign-language broadcasting policy created a tension between cases that dealt with community need and cases where a broadcaster sought to change a format of a television or radio station to foreign-language programming.

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<sup>78</sup> *Id.* ¶ 12, at 71.

<sup>79</sup> *Id.* ¶¶ 13–15, at 72.

<sup>80</sup> *Id.* ¶ 15, at 72.

<sup>81</sup> *Id.* ¶ 25, at 77.

<sup>82</sup> *Hawaiian Paradise Park Corp.*, 5 F.C.C.2d 71, 72 (1966) (concurring statement of Commissioner Johnson).

<sup>83</sup> Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 615 (1998) (describing the “major elements usually necessary to meet the public interest”).

<sup>84</sup> *Licensee Responsibility to Exercise Adequate Control over Foreign Language Programs*, 39 F.C.C.2d. 1037, ¶ 7, 1039 (1973). The licensees also have an affirmative duty to “ascertain the problems and needs of significant groups in their communities and to provide programming responsive to those needs.” *New Mexico Broad. Co.*, 87 F.C.C.2d. 213, § D, 269 (1981) (dissenting statement of Commissioner Joseph R. Fogarty citing 1960 Policy Statement, 25 Fed. Reg. 7291 (1960)).

Spanish-language radio and television have often been referred to as merely an entertainment format, like talk radio or classical music. The FCC has avoided regulation of entertainment formats since the 1970's, due to First Amendment concerns.<sup>85</sup> In the late 1960's and early 1970's, the Commission was faced with a number of cases that brought to the forefront a burgeoning dispute between the listening habits of the public and government's role in regulating programming.<sup>86</sup> The FCC did not want to oversee format changes of its broadcasters because of "the difficulty of objectively evaluating the strength of listener preferences, of comparing the desire for diversity within a particular type of programming to the desire for a broader range of program formats and of assessing the financial feasibility of a unique format."<sup>87</sup> It argued that the market was "far more flexible than governmental regulation and responds more quickly to changing public tastes."<sup>88</sup> In response to these cases, the FCC established a policy<sup>89</sup> to leave entertainment format regulation to the market.<sup>90</sup> The policy was challenged in *FCC v. WNCN Listeners Guild* in the Supreme Court.<sup>91</sup> The Supreme Court in deference to the Commission let

<sup>85</sup> ERWIN G. KRASNOW ET AL., *THE POLITICS OF BROADCAST REGULATION*, 145–69 (3rd ed. St. Martin's Press 1982) (detailing the history of the entertainment format debate at the Commission and in the courts). In the late 1960s and early 1970s, the Commission was faced with cases that brought to the forefront a burgeoning dispute between the listening habits of the public and government's role in regulating programming. *Id.*; see, e.g., *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973) (radio format changed from progressive rock to a "middle of the road" format); *Lakewood Broad. Serv., Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973) (radio format changed from all news to country and western); *Citizens Comm. v. FCC*, 436 F.2d 263 (D.C. Cir. 1970) (a radio station format change from a classical music station to a blended program).

<sup>86</sup> KRASNOW, *supra* note 85, at 145–69.

<sup>87</sup> *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 590 (1981) (noting Dev. of Policy re: Changes in the Entm't Formats of Broad. Stations, 60 F.C.C.2d 858, 862–64 (Jul. 28, 1976)).

<sup>88</sup> *Id.* at 590.

<sup>89</sup> Dev. of Policy re: Changes in the Entm't Formats of Broad. Stations, 60 F.C.C.2d 858 (Jul. 28, 1976).

<sup>90</sup> The policy stated: "the marketplace is the best way to allocate entertainment formats in radio, whether the hoped for result is expressed in First Amendment terms (i.e., promoting the greatest diversity of listening choices for the public) or in economic terms (i.e., maximizing the welfare of consumers of radio programs)." *Id.* ¶ 16, at 863.

<sup>91</sup> *WNCN Listeners Guild*, 450 U.S. at 588–91.

the policy stand;<sup>92</sup> however it cautioned the FCC that its application was too broad suggesting that “the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully.”<sup>93</sup> The Supreme Court required that the FCC act and not just defer to the market forces if the public interest is better served by regulating an entertainment format dispute.

This debate over entertainment formats prevented a broadcaster from offering a Spanish-language radio program in Arizona in 1971. KEVT, a Tucson-based, English-language radio station, sought to expand and offer night-time Spanish-language programming.<sup>94</sup> The request involved a more powerful radio signal which, in turn, required a waiver from the FCC to grant a more powerful signal for the station.<sup>95</sup> A night-time service waiver is granted when a licensee promises first primary service<sup>96</sup> to at least 25% of the area or at least 25% of the population residing therein.<sup>97</sup> KEVT alleged that it could prove a substantial portion of the population spoke Spanish and would be served by the new service.<sup>98</sup> In light of the FCC’s policy that Spanish-language radio was only an entertainment format, the FCC was hesitant to grant the waiver solely because of the “specialized nature of [the] proposed programming.”<sup>99</sup> However, when the D.C. Circuit reviewed this waiver request, it found a dramatic distinction based on the foreign-language aspect of the proposal, stating that “there

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<sup>92</sup> The Supreme Court found that “the Commission ha[d] not forsaken its obligation to pursue the public interest [in this matter]. On the contrary, [the Commission] ha[d] assessed the benefits and the harm likely to flow from Government review of entertainment programming, and on balance ha[d] concluded that its statutory duties are best fulfilled by not attempting to oversee format changes.” *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 595 (1981).

<sup>93</sup> *Id.* at 603.

<sup>94</sup> *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1381 (D.C. Cir. 1971).

<sup>95</sup> *Id.*

<sup>96</sup> The “first primary service requirement was adopted . . . in recognition of the principle that each new nighttime assignment inevitably degrades the service areas of unlimited-time cochannel stations and precludes possible future cochannel nighttime operations over a wide area.” *Champaign Nat’l Bank*, 22 F.C.C.2d 790, ¶4, 791 (Apr. 29, 1970).

<sup>97</sup> *Tucson Radio, Inc.*, 452 F.2d at 1381.

<sup>98</sup> *Id.* at 1382.

<sup>99</sup> *Id.* at 1382 n.1.

is a crucial difference between failure to *serve* a group which cannot understand the language broadcasted, and a failure to *reach* a group which chooses not to listen because of program content.”<sup>100</sup> The court suggested that the circumstances at issue with KEVT were “unique” and that interpreting the rule in favor of KEVT would not result in a “flood of applications for licenses” whereby a group could demand service because it could prove a substantial portion of the listening audience would prefer to hear particular content, say, classical music, and it was not being served.<sup>101</sup> The DC Circuit viewed the KEVT waiver request as more than a format change, since language was a critical determinative factor in audience access to the format. The FCC conceded that “[i]f a substantial segment of the community thinks and speaks in the Spanish language only, and cannot understand the English language, the broadcast stations in that area must be responsive to this fact.”<sup>102</sup> The FCC agreed to consider foreign-language as a critical factor in future waivers of this service rule.<sup>103</sup> Format changes are still left to market forces, however the FCC demonstrated in the KEVT decision that “Spanish” was more than merely a format and viewed foreign-language programming as serving the community need.

### 3. Broadcast Ownership

Despite such a commitment to serving community need, the FCC has denied that language is a factor it considers in ownership decisions. However, this policy has been inconsistently applied. In the 1995 *Spanish Radio Network* decision, the Commission determined that language was neither a factor in ownership

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<sup>100</sup> *Id.* (emphasis in original).

<sup>101</sup> *Id.*

<sup>102</sup> Tucson Radio Inc., 35 F.C.C.2d. 584, ¶ 6, 585 (June 20, 1972). The FCC stated that: [I]f a petitioner can show (i) that a substantial segment of the community speaks exclusively a language other than English; (ii) a need exists for aural broadcast service in that language; (iii) that none of the existing stations would serve this need; and (iv) that the prospects for obtaining such service by resort to existing Commission remedies are poor, the Commission would then entertain a petition for waiver of its primary service rule.

*Id.* ¶ 6, at 585–86.

<sup>103</sup> *Id.* ¶ 6, at 585–86.

regulation nor a factor for defining the market for the radio transfer application.<sup>104</sup> The petitioners, a group from the Florida Cuban community, argued that the transfer of ownership of a Miami radio station to Heftel<sup>105</sup> violated the local radio ownership rules<sup>106</sup> because the definition of the market for purposes of the ownership rule was “Spanish radio.”<sup>107</sup> The petitioners contended that the relevant market for public interest review could be defined by language, because the ownership rules were supposed to extend beyond regular antitrust concerns and focus on the diversity of voices.<sup>108</sup> The Commission disagreed with the petitioners: “[A]lthough Spanish speakers may be perceived by those seeking to reach them as a distinct market, the multiple ownership rules are not geared toward such a market definition.”<sup>109</sup> According to the FCC, the multiple ownership rules use the term “market” as the equivalent of audience share.<sup>110</sup> The Commission argued that radio markets, as defined by Arbitron,<sup>111</sup> are not distinguished based on language.<sup>112</sup> The FCC did not flatly refuse a potential re-reading of the rules, but said that to derive a different definition would require a rulemaking to “change its current multiple ownership rules and policies.”<sup>113</sup> The FCC appeared receptive to the concept of language as a factor in ownership decisions, however it was unable to do so in this license transfer decision

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<sup>104</sup> Spanish Radio Network, 10 F.C.C.R. 9954, ¶ 7, 9955 (1995).

<sup>105</sup> Heftel was a pre-cursor entity of Univision’s merger target, Hispanic Broadcasting Corporation. See *infra* note 170 and accompanying text.

<sup>106</sup> Spanish Radio Network, 10 F.C.C.R. 9954, ¶ 2, 9954 (1995).

<sup>107</sup> *Id.* ¶ 4, at 9955.

<sup>108</sup> *Id.* ¶ 5, at 9955.

<sup>109</sup> *Id.* ¶ 8, at 9956.

<sup>110</sup> *Id.*

<sup>111</sup> “Arbitron Inc. . . . is an international media and marketing research firm serving radio broadcasters, cable companies, advertisers, advertising agencies and outdoor advertising companies. . . . Arbitron’s core businesses are measuring network and local market radio audiences across the United States.” Arbitron, *About Arbitron*, at <http://www.arbitron.com/home/content.stm> (last viewed Oct. 9, 2004).

<sup>112</sup> Spanish Radio Network, 10 F.C.C.R. 9954, ¶ 8, 9956 (1995). Nielsen, which calculates television audience share (market), takes into consideration language for Hispanic-American ratings. Nielsen Media Research, *Hispanic-American Television Audience*, at <http://www.nielsenmedia.com/ethnicmeasure/hispanic-american/indexHisp.html> (last viewed Oct. 9, 2004) (“Language usage in these homes has an important impact on TV viewing choices.”).

<sup>113</sup> Spanish Radio Network, 10 F.C.C.R. 9954, ¶ 9, 9956 (1995).

because the FCC required a rulemaking to change existing broadcast ownership regulations.<sup>114</sup>

The FCC found that language significantly affected market advertising and competition, (critical components of the broadcast ownership review), even if it did not go so far as to directly include language in the market definition of the NBC/Telemundo merger.<sup>115</sup> Had the merger been approved outright, NBC would have owned three stations in the Los Angeles market in violation of the television duopoly rule,<sup>116</sup> which only permitted a company to own two stations in the same market if the market was sufficiently diverse.<sup>117</sup> NBC requested a twelve month window so it could divest itself of one of its Los Angeles stations and comply with the rule.<sup>118</sup> It argued that temporary ownership of three stations in Los Angeles was not a threat to competition and diversity in that market since “the NBC and Telemundo stations serve distinct audiences and do not compete directly for advertising dollars.”<sup>119</sup> A comparable situation arose several years before in the Los Angeles market when Disney merged with ABC.<sup>120</sup> In that case, the FCC required divestiture of the offending station within six months because Disney would have controlled 25% of the market’s total advertising revenue.<sup>121</sup>

However, the Commission conceded that NBC needed twice as much time to divest the television station as ABC did in the same exact market, due to the Spanish-language character of the television stations at issue. First, Telemundo’s Spanish-language stations generated significantly less advertising money than the

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<sup>114</sup> *Id.* ¶ 9; see also 2 AM. JUR. 2D *Administrative Law* § 137 (2004) (distinguishing between administrative agency actions of adjudication and rulemaking).

<sup>115</sup> Telemundo Commun. Group, Inc., 17 F.C.C.R. 6958 (2002).

<sup>116</sup> *Id.* ¶ 1, at 6960–61.

<sup>117</sup> *Id.* ¶ 1, at 6961 n.1 (citing to 47 C.F.R. § 73.3555(b) which read: “The television duopoly rule provides that a single entity may own two stations in the same television market (Nielsen DMA) if, following the acquisition, there would remain at least eight independently owned and operated television stations and at least one of the stations is not ranked in the top 4 in the market based upon the most recent all-day audience share.”).

<sup>118</sup> *Id.* ¶ 1, at 6960–61.

<sup>119</sup> *Id.* ¶ 42, at 6974.

<sup>120</sup> *Id.* ¶ 52, at 6978.

<sup>121</sup> *Id.*

Disney stations<sup>122</sup> and would have been harder to sell in a six month period.<sup>123</sup> Second, the Commission found that the Spanish-language stations “d[id] not compete directly with” the NBC English-language station since the three stations at issue, each had “distinct programming and a different audience.”<sup>124</sup> Therefore common ownership was less onerous than the ABC/Disney situation.<sup>125</sup> The FCC allowed NBC the extra time to comply based on the “Spanish-language character of the station” and its economic conditions.<sup>126</sup> Without resorting to a public rulemaking, as had been suggested in *Spanish Radio Network*, the FCC used language to assess competition and advertising when it approved the Telemundo/NBC merger.

#### 4. Network Representation Rule

Despite the FCC’s avoidance of language as a market definition for broadcast ownership decisions, it has vigorously and exclusively protected Spanish-language broadcasters by granting them permanent waivers to the network representation rule which governs the advertising relationship between national broadcast networks and their local affiliates.<sup>127</sup> By doing so the FCC has acknowledged that Spanish-language media faces different marketplace challenges and conditions than English-language media.

The network representation rule was created in the 1950s<sup>128</sup> and prohibits affiliates “from being represented by their network in the non-network (spot) advertising sales market.”<sup>129</sup> Spot advertising refers to the time slots “purchased on a market-to-

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<sup>122</sup> *Id.* ¶ 52, at 6978–79.

<sup>123</sup> *Id.* ¶ 51, at 6978.

<sup>124</sup> *Id.* ¶ 48, at 6977. The two Telemundo stations had different sets of Spanish-language programming and the NBC station operated in English. *Id.*

<sup>125</sup> *Id.* ¶ 52, at 6978–79.

<sup>126</sup> *Id.* ¶ 52, at 6979.

<sup>127</sup> See *infra* text accompanying notes 128–56.

<sup>128</sup> Network Representation of TV Stations in National Spot Sales; Request of Spanish National Network, NPRM, 47 C.F.R. Part 73, 45895, ¶ 6, 45896–97 (Oct. 4, 1978).

<sup>129</sup> S’holders of Hispanic Broad. Corp., 2003 FCC LEXIS 5106, ¶ 50, \*59 n.98 [hereinafter Univision License Transfer].

market basis rather than through a network.”<sup>130</sup> Spot advertising is an area the FCC wanted to leave in the control of the affiliates—and the independent advertising reps they hired—because the FCC believed that “network involvement in national spot representation of affiliates ‘involves interference with the licensee’s independent duty to operate his station in the public interest.’”<sup>131</sup> This is because affiliates would not be able to maintain their independence if the networks controlled the advertising firms who were setting the advertising rates in the spot sales market.<sup>132</sup> The FCC did not want networks to own the advertising representation firms (“rep firms”) that could potentially favor the networks in rate setting decisions by the stations.<sup>133</sup> In 1978, Spanish International Network (“SIN”)<sup>134</sup> sought a waiver from the network representation rule,<sup>135</sup> arguing that competition concerns behind the rule did not apply in the Spanish-language market.<sup>136</sup> The rule was supposed to maintain competition between national rep firms. However, unlike the English-language market where there were many national rep firms to sell non-network advertising, there was only one other rep firm selling Spanish-language advertising.<sup>137</sup> SIN argued that if it were subject to the rule, it would not be able to afford to create separate national spot and network sales advertising organizations.<sup>138</sup>

The FCC, however, was concerned that SIN’s relationship with its affiliates would be just as detrimental as any other major network acting as the rep firm for its affiliates.<sup>139</sup> The FCC

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<sup>130</sup> University of Texas, Department of Advertising, *Quick Index* (defining “spot television” (or “spot radio”)), at <http://advertising.utexas.edu/research/terms/#S> (last viewed Oct. 27 2004).

<sup>131</sup> Network Representation of TV Stations in National Spot Sales, *supra* note 128, ¶7, at 45897.

<sup>132</sup> *Id.* ¶ 7, at 45897.

<sup>133</sup> *Id.*

<sup>134</sup> SIN is the predecessor entity to Univision. Univision, *Company Overview: History*, at <http://www.univision.net/corp/en/history.jsp> (last visited Oct. 9, 2004).

<sup>135</sup> Network Representation of TV Stations in National Spot Sales, *supra* note 128, ¶ 1, at 45896.

<sup>136</sup> *Id.* ¶ 8, at 45897.

<sup>137</sup> *Id.* ¶ 10, at 45897.

<sup>138</sup> *Id.* ¶ 8, at 45897.

<sup>139</sup> *Id.* ¶ 11, at 45897.



recognized that SIN had a “high degree of control” over the stations it served and “to the extent the Spanish-speaking population forms a distinct audience or ‘market,’” granting a waiver in this area [might] increase that “concentration of control.”<sup>140</sup> In the end, the FCC considered the economic consequences at the time. SIN’s total spot revenue for its twelve stations was \$9.6 million, compared to the \$2.6 billion in revenue produced by the “Big Three” (NBC, ABC, and CBS).<sup>141</sup> The national networks enjoyed greater economic success than “‘fledgling’ entities” such as SIN and its affiliates,<sup>142</sup> so the FCC granted a temporary waiver of the network representation rule, thereby allowing SIN to be the only television broadcaster to make national spot advertising sales for its own affiliates.<sup>143</sup> The FCC issued a rulemaking and allowed SIN to serve as national advertising representative to its affiliates until Oct. 1, 1979, or 60 days after the final decision, whichever was later.<sup>144</sup> This waiver was not reviewed until 1990 and SIN had the un-checked benefit of the waiver for 11 years.

Although the Commission still had not resolved the matter in 1984, an Administrative Law Judge (“ALJ”) reviewed the six-year-old waiver during a hearing on alien control of several Spanish-language stations.<sup>145</sup> SIN had argued that the waiver was necessary because SIN’s programming hours would be limited and sales would be at most \$10 million a year.<sup>146</sup> But the judge noted that in the six years that SIN benefited from the exclusive waiver, it acquired 300 cable and broadcast affiliates, operated twenty-four hours a day, and controlled “approximately \$98 million of the \$118 million dollars spent in 1984 on Spanish television advertising.”<sup>147</sup> The ALJ questioned whether the waiver prevented competing spot

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<sup>140</sup> *Id.* ¶ 12, at 45898.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* ¶ 17, at 45898.

<sup>144</sup> *Id.*

<sup>145</sup> Spanish Int’l Communications Corp., 1986 FCC LEXIS 4175, ¶ 1, at \*2 (1986) [hereinafter Seven Hills ALJ Decision].

<sup>146</sup> *Id.* ¶ 186, at \*114.

<sup>147</sup> *Id.* ¶ 186, at \*\*114–15.

sales representatives from entering the market,<sup>148</sup> and whether lifting the waiver would potentially increase competition and relieve broadcasters from having to deal exclusively with SIN.<sup>149</sup> The ALJ concluded that the extension of the waiver to SIN was not in the public interest.<sup>150</sup>

However, the Commission did not consider the matter until it issued a Further Notice of Proposed Rulemaking in 1988, to reopen the inquiry into the necessity of the waiver.<sup>151</sup> The temporary waiver of the network representation rule was extended until 1990,<sup>152</sup> when the FCC concluded that a permanent waiver should be issued to SIN/Univision.<sup>153</sup> The permanent waiver was granted to all Spanish-language networks entering the market including Telemundo (1990),<sup>154</sup> and Azteca America (2003).<sup>155</sup> The FCC stated that it was in the public interest to “encourage[e] the growth and development of new networks; foster foreign-language programming; increase[e] programming diversity; strengthen competition among stations; and foster a competitive UHF service.”<sup>156</sup> Despite evidence of SIN’s increased concentration of control over its affiliates and the potential harm it would engender, the FCC extended the waiver of the rule permanently to all Spanish-language broadcasters entering the market on the theory that the marketplace conditions are unique and distinct for Spanish-language media, thus demonstrating the

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<sup>148</sup> *Id.* ¶ 187, at \*117.

<sup>149</sup> *Id.* ¶ 190, at \*118.

<sup>150</sup> *Id.* ¶ 191, at \*119.

<sup>151</sup> Amend. of § 73.658(i) of the Comm’n’s Rules, Concerning Network Rep. of TV Stations in Nat’l Spot Sales; Request of Spanish Int’l Network (SIN) for Waiver of § 73.658(i), 3 F.C.C.R. 2746, ¶¶ 1–2, 2746 (May 12, 1988).

<sup>152</sup> *Id.* ¶ 2, at 2746.

<sup>153</sup> Amend. of § 73.658(i) of the Comm’n’s Rules, Concerning Network Rep. of TV Stations in Nat’l Spot Sales; Request of Spanish Int’l Network (SIN) for Waiver of § 73.658(i), Request of Telemundo Group, Inc. for Waiver of § 73.658(i); Request of Latin Int’l Network Corp. for Waiver of § 73.658(i), 5 F.C.C.R. 7280, ¶ 1, 7280 (Dec. 3, 1990). SIN had changed its name in the interim years to Univision. *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Azteca Int’l Corp.; Petition for Waiver of § 73.658(i) of the Comm’n’s Rules, 18 F.C.C.R. 10662, ¶ 5, 10663 (May 23, 2003).

<sup>156</sup> *Id.* ¶ 3, at 10663 (quoting Report and Order for permanent waivers for Univision and Telemundo).

FCC's readiness to use language as determinative factor of competition inquiries.

### 5. Cable Television

Although the FCC has rejected language as a factor in broadcast television and radio, the Commission has regulated Spanish-language cable television carriage based on language to promote programming diversity,<sup>157</sup> thus demonstrating a concern for foreign-language media in those limited circumstances. When the FCC began adopting rules to govern cable carriage in the early 1970s, foreign-language stations were treated differently.<sup>158</sup> They were defined by the FCC as specialty stations,<sup>159</sup> those not of "general interest to the average viewer."<sup>160</sup> Specifically, the Commission noted that "a program broadcast in a foreign language is of little interest to any but those fluent in the language."<sup>161</sup> The FCC determined that specialty channels would be protected in their local markets because local cable operators were required to carry local channels<sup>162</sup> ("must carry" rules).<sup>163</sup> Specialty stations would also get the benefit of a Commission waiver so that distant cable

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<sup>157</sup> Spanish-language cable channels benefit from unique cable rules defined by language. This note focuses on encouraging Spanish-language media regulation for broadcast television under a market definition based on language which has not been explicitly used before despite its prevalent use in cable. *See generally* Part I.B.5.

<sup>158</sup> Letter from Philip L. Verveer et al., Attorneys for SBS, to Marlene H. Dortch, Aug. 6, 2003, at 8 (citing Amendment of Part 74, Subpart K of the Comm'n's Rules & Regulations Relative to Cmty. Antenna Television Sys., et seq., Cable Television Report and Order, 36 F.C.C.2d 143, ¶ 96, at 180–81 (Feb. 2, 1972)).

<sup>159</sup> Amend. of Part 76, Subparts A & D of the Comm'n's Rules & Regulations Relative to Adding a New Definition for "Specialty Stations" & "Specialty Format Programming" & Amending the Appropriate Signal Carriage Rules, 58 F.C.C.2d 442, ¶ 2, 442 (Feb. 26, 1976) (Educational stations were included in this definition as well.).

<sup>160</sup> *Id.* ¶ 24, at 452. The FCC found that the average viewer would not approach news, films or sporting events in Spanish and English equally. *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Amend. of Part 76, Subparts A & D of the Comm'n's Rules & Regulations Relative to Adding a New Definition for "Specialty Stations" & "Specialty Format Programming" & Amending the Appropriate Signal Carriage Rules, 58 F.C.C.2d 442, ¶ 36, 457 (Feb. 26, 1976).

<sup>163</sup> A commercial broadcast station is allowed to "assert mandatory carriage rights on cable systems located within the station's [DMA]." CoxCom, Inc., 17 F.C.C.R. 17192, ¶ 2 (Sept. 16, 2002) (citing the must carry order); *see also*, FCC, *About Us*, <http://www.fcc.gov/aboutus.html> (Consumer Guide Glossary) (last viewed Nov. 3, 2004).

systems could pick up their carriage.<sup>164</sup> The Commission demonstrated a readiness to tailor regulation based on language in cable carriage.

### *C. Spanish-Language Media Marketplace*

Despite a long history of foreign-language media in America, traditional outlets for Spanish-language media were “old-line community newspapers, low-wattage AM radio stations and one struggling television network.”<sup>165</sup> Today the Spanish-language media industry is one of the country’s fastest growing media segments, with advertising and revenues increasing exponentially.<sup>166</sup> As the Spanish speaking population grows,<sup>167</sup> Spanish-language media will increase in importance and influence.<sup>168</sup> Part I.C will define the landscape of the Spanish-language media market, outlining the leading companies in radio and television and describing the statistical studies that illustrate the ways in which the Spanish-language audience use Spanish-language media.

#### 1. Radio

The dominant companies in Spanish-language radio are Hispanic Broadcasting Corporation (now Univision Radio), Entravision, and Spanish Broadcasting System. HBC was created with the 1997 merger of Heftel Broadcasting Corp. and Tichenor Media Systems.<sup>169</sup> Heftel was renamed Hispanic Broadcasting in

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<sup>164</sup> Amend. of Part 76, Subparts A & D of the Comm’n’s Rules & Regulations Relative to Adding a New Definition for “Specialty Stations” & “Specialty Format Programming” & Amending the Appropriate Signal Carriage Rules, 58 F.C.C.2d 442, ¶ 2, 442 (Feb. 26, 1976).

<sup>165</sup> Frank Ahearns & Krissah Williams, *Spanish-Language Media Expand: Broadcasters, Newspaper Pursue Fast-Growing Market*, WASH. POST, Aug. 11, 2003, at A1.

<sup>166</sup> See *id.* (noting Spanish-language broadcasting is a fast growing market).

<sup>167</sup> See El Nasser, *supra* note 1, at A1.

<sup>168</sup> David Hinckley, *Spanish Media Trend Extends to Infinity*, N.Y. DAILY NEWS, Oct. 6, 2004, at 140 (“This is a very important market for everyone in media.”).

<sup>169</sup> *HBC Overview: Timeline*, at <http://www.hispanicbroadcasting.com/overview-timeline.htm> (last viewed Oct. 9, 2004).

1999.<sup>170</sup> HBC was referred to as the “largest Spanish language radio broadcasting company in the United States”<sup>171</sup> and before HBC merged with Univision in 2003, HBC owned sixty-six radio stations in fifteen of the top twenty Hispanic markets.<sup>172</sup> It controlled “51 percent of Spanish-language radio revenue in the top 10 markets in 2002.”<sup>173</sup>

Entravision, founded in 1996, maintains holdings in radio, television and outdoor advertising.<sup>174</sup> Entravision television stations “represent the largest television affiliate group of the top-ranked Univision network.”<sup>175</sup> With fifty-six radio stations in the top fifty Hispanic markets, Entravision is “one of the nation’s largest Spanish-language radio broadcasters.”<sup>176</sup> Entravision’s radio division was HBC’s greatest competitor.<sup>177</sup>

Spanish Broadcasting System (“SBS”) is the “largest Hispanic-controlled radio broadcasting company in the [U.S.]”<sup>178</sup> Founded in 1983, SBS operates “27 stations in seven of the top-ten U.S. Hispanic market.”<sup>179</sup> Viacom has taken a 15% stake in SBS subject to the FCC’s approval.<sup>180</sup>

<sup>170</sup> *Id.* HBC’s largest shareholder was Clear Channel Communications. Meg James & Jeff Leeds, *Regulators Face a Bilingual Conundrum; A Proposed Merger Poses a Question: Are Spanish-Language Media Their Own Market?*, L.A. TIMES, Nov. 24, 2002, § 1, at 1.

<sup>171</sup> *Investor Relations: Company Overview*, at [http://www.hispanicbroadcasting.com/investor\\_overview.asp](http://www.hispanicbroadcasting.com/investor_overview.asp) (last viewed Oct. 9, 2004).

<sup>172</sup> Jordan Levin, *Univision Sparks Heated Debate in Two Languages*, MIAMI HERALD, Jun. 22, 2003, <http://www.miami.com/mld/miamiherald/6137596.htm?lc> (last visited Oct. 9, 2004).

<sup>173</sup> *Id.* (according to “BIA,” a firm specializing in media financial-analysis).

<sup>174</sup> Entravision, *Overview*, at <http://www.entravision.com/template.cfm?page=about-&subpage=overview> (last viewed Oct. 10, 2004).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See *infra* note 257 and accompanying text.

<sup>178</sup> *Corporate History*, at <http://www.spanishbroadcasting.com/corporatehistory.shtml> (last viewed Oct. 10, 2004). Raúl Alarcón, Jr. is the Chairman and CEO of SBS. *Id.* The Alarcón family has been involved in Spanish-language broadcasting since the 1950’s. *Id.*

<sup>179</sup> *About Us*, at <http://www.spanishbroadcasting.com/aboutus.shtml> (last viewed Oct. 10, 2004).

<sup>180</sup> Press Release, Viacom Inc., Viacom and Spanish Broadcasting System Announce Strategic Alliance (Oct. 5, 2004), <http://www.viacom.com/press.tin?ixPressRelease=80454180> (last viewed Oct. 10, 2004).

## 2. Television

The leading sources for Spanish-language broadcast television are Univision and Telemundo. These companies are fiercely competitive with each other<sup>181</sup> and yet claim that they also compete with mainstream English-language broadcasters.<sup>182</sup>

### a) Leading Companies

Univision Communications Inc. (“Univision”) started out as SIN in 1961.<sup>183</sup> Before the merger with HBC, Univision owned two television networks,<sup>184</sup> a cable network, three record labels and a popular Internet website.<sup>185</sup> Through the merger, Univision grew to sixty-eight radio stations.<sup>186</sup> Newspapers commonly call Univision the “king of Spanish-language TV.”<sup>187</sup> Univision itself says it’s the “premier Spanish-language media company in the United States.”<sup>188</sup> Univision Network is “not only the largest Spanish-language network in the U.S., but also the fifth largest network overall.”<sup>189</sup> “More Hispanics watch the Univision

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<sup>181</sup> See Eduardo Porter, *Univision Keeps a Short Leach on Its Stars*, WALL ST. J., (July 25, 2003) at B1 (noting the ban Univision has on allowing its stars to appear on Telemundo in any capacity).

<sup>182</sup> Jube Shiver, *FCC OK Seen for Univision Bid for Rival*, L.A. TIMES, July 30, 2003, at C1 (remarking that Univision has suggested it “must grow to compete effectively against English-language media conglomerates.”).

<sup>183</sup> Ahearns & Williams, *supra* note 165, at A1. SIN was created to act as a sales representative for a Los Angeles TV station and several Mexican border stations. Seven Hills ALJ Decision, *supra* note 145, ¶ 27, at \*17. Originally Televisa, “the largest producer and exporter of Spanish-language programming in the world,” had a 75-percent ownership stake in SIN. *Id.* ¶¶ 32–33, at \*19–20. “Univision” started out as a “sales concept” which included a package of live Televisa programming that SIN and Televisa offered to other licensees. *Id.* ¶¶ 54–55, at \*31–32.

<sup>184</sup> The two broadcast networks are Univision Network and Telefutura Network (launched in 2002). *History*, at <http://www.univision.net/corp/en/history.jsp> (last viewed Oct. 10, 2004).

<sup>185</sup> *Business Description*, at <http://www.univision.net/corp/en/business.jsp> (last viewed Oct. 10, 2004).

<sup>186</sup> *Id.*

<sup>187</sup> James & Leeds, *supra* note 170, at A1.

<sup>188</sup> Press Release, Univision, Univision Completes Merger with Hispanic Broadcasting (Sept. 22, 2003), [http://www.univision.net/corp/en/pr/Los\\_Angeles\\_22092003-2.jsp](http://www.univision.net/corp/en/pr/Los_Angeles_22092003-2.jsp) (last viewed Oct. 10, 2004).

<sup>189</sup> *Univision Network*, at <http://www.univision.net/corp/en/univision.jsp> (last viewed Oct. 10, 2004).

Network in each ratings daypart (primetime, daytime etc. . .) than each of ABC, CBS, NBC, FOX and Telemundo.”<sup>190</sup> In the 2002–2003 season, “49 of the top-50 Spanish-language shows . . . aired on Univision.”<sup>191</sup> It controls 80% of the Spanish-language TV audience.<sup>192</sup> The Univision Music Group, a subsidiary of Univision Communications, controls “about 35% of the Latin music market.”<sup>193</sup> Univision.com is also the “No. 1 Spanish-language website for U.S. Hispanics.”<sup>194</sup>

In 1987, decades after the advent of Univision, Telemundo entered the market,<sup>195</sup> and it has never truly rivaled the older station in ratings.<sup>196</sup> After a bankruptcy and several changes in ownership,<sup>197</sup> NBC acquired Telemundo in 2002 for \$2 billion.<sup>198</sup> Telemundo is now considered “the second-largest Spanish-language TV network in the U.S.”<sup>199</sup> However, Telemundo has often placed “a distant second in audience ratings to Univision.”<sup>200</sup> Although Telemundo operates in 118 markets, reaching 91% of Hispanic TV households,<sup>201</sup> Telemundo has only approximately 20% of the viewing audience, with the other 80% captured by Univision.<sup>202</sup> Telemundo has been historically and derogatorily

<sup>190</sup> *Id.*

<sup>191</sup> Louis Chunovic, *Spanish-Language TV Hits Stride at Upfront Market*, TELEVISION WEEK, May 26, 2003, at 16. The one “non-Univision series” was the Super Bowl. *Id.*

<sup>192</sup> Shiver, *supra* note 182, at C1; Navarro, *supra* note 3, at C8.

<sup>193</sup> *Business Description*, at <http://www.univision.net/corp/en/business.jsp> (last viewed Oct. 10, 2004).

<sup>194</sup> *History*, at <http://www.univision.net/corp/en/history.jsp> (last viewed Oct. 10, 2004). The website gets “over 1 billion hits a year.” Marcelo Ballve, *The Battle For Latino Media*, NACLA REPORT ON THE AMERICAS, Jan.–Feb. 2004, at 20.

<sup>195</sup> Michael White, *Telemundo Spends on Novelas to Woo Viewers; NBC Pushes More Original Programming*, SUN-SENTINEL (FORT LAUDERDALE, FL), Oct. 26, 2003, at 15F.

<sup>196</sup> Jordan *infra* note 203, at B1 (noting “Univision’s dominance has long rendered Miami-based Telemundo a weak No 2.”).

<sup>197</sup> *Id.*

<sup>198</sup> James & Leeds, *supra* note 170, at A1.

<sup>199</sup> *Id.*

<sup>200</sup> Rowley & Lewis, *supra* note 49, § 3, at 11.

<sup>201</sup> *Corporate Information*, at <http://www.telemundo.com/telemundo/2449824-detail.html> (last viewed Oct. 10, 2004). Univision reaches 98 percent “of all U.S. Hispanic television households.” *Business Description*, at <http://www.univision.net/corp/en/business.jsp> (last viewed Oct. 10, 2004).

<sup>202</sup> Harry Berkowitz, *Spanish-Language Telemundo Bought by NBC*, NEWSDAY, Oct. 12, 2001, at A62.

perceived as a “Caribbean network.”<sup>203</sup> It has been suggested that Telemundo does not connect with Hispanics of Mexican descent, the core U.S. Hispanic target audience.<sup>204</sup> Its primetime network audience share of Hispanic 18–49 year-olds has increased from 17% to 23% in 2004, but as one analyst put it, it had “nowhere to go but up.”<sup>205</sup> Univision still has three times as many viewers as Telemundo, a wider geographical reach, and a new radio platform to cross-promote its programming.<sup>206</sup> Even with the power of NBC behind Telemundo, Univision continues to dominate the television market.

#### b) Hispanic Audience Television Viewing Habits

Recent research shows that Spanish-language audiences have different media habits than English-language audiences. There is a demonstrated preference for news and entertainment programming in Spanish, even if the viewers are bilingual and cable and internet offerings are not as accessible. Second Audio Program (“SAP”) has been an alternative tool in the television arsenal to reach Spanish-language audiences.<sup>207</sup> SAP allows television stations to broadcast in English and at the same time offer a Spanish-language simulcast.<sup>208</sup> However, there has been some debate over whether

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<sup>203</sup> Miriam Jordan, *Telemundo Network Takes on Univision with Help from NBC*, WALL. ST. J., Apr. 15, 2004, at B1 (chronicling the struggles Telemundo has faced in competing with Univision and some of the steps NBC is taking to assist Telemundo). Due to Univision’s deal with Televisa, a large investor in Univision and the “world’s largest Hispanic broadcaster,” Univision has a lock on “a steady supply of Mexican telenovelas [(soap operas)] and unbeatable prime-time ratings.” *Id.* Telemundo had sourced programming from Columbia and Brazil but that type of programming did not catch on with “viewers of Mexican descent.” *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Jordan, *supra* note 203, at B2.

<sup>207</sup> “In 1985, the FCC allowed television stations to begin broadcasting stereo audio. Not only did we get Stereo, but we also got an additional channel where we can broadcast another audio program. This channel is called SAP for Second Audio Program.” Milwaukee Public Television, *SAP*, <http://mptv.org/mptvhome/tech/sap.html> (last viewed Nov. 4, 2004).

<sup>208</sup> E.g., Jodi Bizar, *Language Barrier; Simulcasts in Spanish of News Programs a Debatable Strategy for Television Stations*, SAN ANTONIO EXPRESS-NEWS, June 15, 2002, at 1B. SAP is available on all stereo-equipped TVs. *Id.*



offering SAP simulcasts are worthwhile.<sup>209</sup> For instance, ABC launched a Spanish simulcast of World News Tonight with Peter Jennings in 2000.<sup>210</sup> Yet after one year the simulcast was discontinued because it was not worth the annual \$1 million cost to maintain the service, as it did not make an appreciable difference on Hispanic viewership.<sup>211</sup> Since localism and diversity are measured by local news programming,<sup>212</sup> there is great concern about whether SAP broadcasts of the local news advance the public interest. Some parties have criticized the simulcasts as not being a fair substitute for local news in Spanish.<sup>213</sup> A recent study by the Tomas Rivera Institute found that “Hispanics tend to prefer news on Spanish stations, which offer more local and international Latino news plus a smoother style.”<sup>214</sup> Local news stations in large Hispanic markets have stated, “English-language stations and the Spanish-language stations appeal to different audiences.”<sup>215</sup> News stories translated into Spanish are still directed at Anglos and not Latinos.<sup>216</sup> In a study comparing Spanish-language local news with English-language local news, it was found that they were equal in quality (both were given Cs on average),<sup>217</sup> but the subject matter of coverage differed greatly.<sup>218</sup>

<sup>209</sup> See *id.*; John M. Higgins, *Spanish on SAP Just Hasn't Caught on*, BROADCASTING & CABLE, Mar. 24, 2003, at 24.

<sup>210</sup> Sandra Hernandez, *ABC Rocks en Espanol*, L.A. WEEKLY, Oct. 13–19, 2000, <http://www.laweekly.com/ink/00/47/offbeat.php> (last visited Oct. 10, 2004).

<sup>211</sup> Bizar, *supra* note 208, at 1B; Higgins, *supra* note 209, at 24. Local broadcaster WRAL in Raleigh, N.C. launched simultaneous translation of its local news and after two years ended the program due to cost and lack of feedback. Higgins, *supra* note 209, at 24.

<sup>212</sup> Biennial Review 2002, *supra* note 22, ¶ 78, at 13644.

<sup>213</sup> Tatiana Pina, *Channel 6 Offering Local News in Spanish*, PROVIDENCE J., Oct. 26, 2001, at B03. One broadcast personality said, “It’s a nice effort but the Latino community is really interested in hearing local news from their perspective. They like local news and international news from their countries of origin.” *Id.*

<sup>214</sup> Higgins, *supra* note 209, at 24.

<sup>215</sup> Daisy Whitney, *L.A. Stations Evolve to Serve Population Shifts*, ELECTRONIC MEDIA, July 24, 2000, at 13.

<sup>216</sup> Higgins, *supra* note 209, at 24.

<sup>217</sup> Quality was judged by topic range, focus, enterprise of stories, expertise, number of sources, viewpoints and local relevance. Lauren Alexandre & Henrik Rehbinder, *Separate but Equal, Comparing Local News in English and Spanish, Special report: Local TV News, On the Road to Irrelevance*, COLUM. JOURNALISM REV./PROJECT FOR EXCELLENCE IN JOURNALISM, (Nov./Dec. 2002), at 99, available at

A recent study showed that SAP has not been considered a significant substitute for Spanish-language programming, since only 42% of Hispanic households are cognizant of its existence and only one in six study respondents used it with any frequency.<sup>219</sup> Univision itself has challenged the notion that English-language SAP simulcasts are a worthy substitute for Spanish-language programming, stating that cultural preferences for Spanish-language programming are the reason behind Univision's dominance in the Hispanic ratings.<sup>220</sup> Top-rated English-language shows such as *Friends* and *CSI* rank 189 and 334, respectively, for Hispanic viewers.<sup>221</sup> Even academics have noted that "viewing patterns for Latinos(as) are . . . different from those of whites."<sup>222</sup> Among bilingual Latinos, the choice of which language they watch on television often depends on the format.<sup>223</sup>

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<http://www.journalism.org/resources/research/reports/localtv/2002/spanish.asp> (last viewed Oct. 10, 2004).

<sup>218</sup> *Id.* Thirty-four percent of the Spanish-language broadcasts portrayed police officers as the likely antagonists, whereas twenty-six percent of English-language broadcasts included crime stories. *Id.* at 100. Immigration stories were common in Spanish-language news, but practically non-existent in English-language news (less than half of one percent of all stories). *Id.* Foreign affairs coverage in English-language news focused on U.S. foreign policy whereas the focus of Spanish-language news was on Latin America. *Id.*

<sup>219</sup> Press Release, Tomas Rivera Policy Institute, *Channel Surfing in English and Spanish: New Study Reveals the Viewing Habits of the 16 Million Latino Adults Who Watch TV Bilingually*, May 21, 2003, at <http://trpi.org/pages/nr03.html> (noting study Louis DeSipio, *Latino Viewing Choices: Bilingual Television Viewers and the Language Choices They Make*, Tomas Rivera Policy Institute).

<sup>220</sup> Chunovic, *supra* note 191, at 16.

<sup>221</sup> *Id.*

<sup>222</sup> Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 317 (2003). Unique content offered only on Spanish-language channels also could drive viewers in the other direction. English-speaking audiences may begin to tune into Spanish-language programs since Telemundo has begun to make its sexy telenovelas (soap operas) available with English subtitles through closed captioning. *Telenovelas Translated*, N.Y. POST, Apr. 22, 2004, at 91. World Cup soccer matches have often driven English-language viewers to watch Spanish-language networks when they cannot get the games anywhere else. James Ewinger, *World Comes to Irish Haunt for Soccer Cup*, PLAIN DEALER (CLEV.), July 1, 2002, at B1 (noting that Brazilians watched the World Cup on a Spanish channel at an Irish bar).

<sup>223</sup> Press Release, Tomas Rivera Policy Institute, *Channel Surfing in English and Spanish: New Study Reveals the Viewing Habits of the 16 Million Latino Adults Who Watch TV Bilingually*, May 21, 2003, at <http://trpi.org/pages/nr03.html>.

Most bilingual Latinos preferred news, soap operas, and variety programming in Spanish.<sup>224</sup> It is also important to note that “[r]ecent studies have shown that U.S.-born Latinos tend to retain the culture of their heritage more than other immigrant groups.”<sup>225</sup> Even if they speak English well, 60% “of Hispanics prefer to [speak] Spanish.”<sup>226</sup> These statistics show that Spanish-language audiences prefer their programming in Spanish—not just translated into Spanish, but actually targeted for a Spanish-speaking audience.

Despite the growth of Spanish-language offerings on cable, cable has been viewed as an insufficient substitute for free television,<sup>227</sup> especially as a source for local programming.<sup>228</sup> Local news has been the FCC’s indicator for localism and viewpoint diversity in a local market<sup>229</sup> and the FCC’s own studies have shown that “local cable channels are the least watched of any broadcast or cable stations.”<sup>230</sup> Local cable channels operate in limited markets. Local cable channels only reach 10–15% of cable systems nationwide and of the twenty-two local cable news channels available, five serve the New York City area.<sup>231</sup> This problem is exacerbated by cable’s reach to Hispanic households. Cable penetration rates for Hispanic households are much lower than in other American households,<sup>232</sup> so even with a growing number of Spanish-language programming choices available on cable, access remains a problem.<sup>233</sup> Nielsen has found that “[o]ut

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<sup>224</sup> *Id.*

<sup>225</sup> Miriam Jordan, *Hispanic Magazines Gain Ad Dollars*, WALL. ST. J., Mar. 3, 2004, at B2.

<sup>226</sup> *Id.* It is important to recognize that as the Hispanic population grows and more media outlets try to capture that audience, the methods used by different media outlets to accomplish this task will become increasingly varied. Today, some magazines targeted at Hispanics in America are offered in Spanish, some are in English, and some mix English and Spanish for groups who live in both worlds. *Id.* Magazine publishers agree that “[s]imply translating English articles into Spanish doesn’t work.” *Id.*

<sup>227</sup> Baynes, *supra* note 222, at 326–27.

<sup>228</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 405 (3d Cir. 2004).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Baynes, *supra* note 222, at 330; Allison Romano, *Checking the Census*, BROADCASTING & CABLE, Oct. 1, 2001, at 32.

<sup>233</sup> Baynes, *supra* note 222, at 330.

of 10.2 million total Hispanic TV homes, only 6.4 million receive cable or satellite service.”<sup>234</sup> With such a small percentage of Hispanic homes receiving cable, and with little local programming on cable, cable cannot be a sufficient substitute for the local news service provided by broadcast television and radio.

Just as cable access lags behind in Hispanic homes, so does internet access. The FCC has “acknowledged that almost 30% of Americans do not have Internet access.”<sup>235</sup> Internet access for Hispanic households is behind that of non-Hispanic households and “only about 3 percent of all content on the Web is in Spanish.”<sup>236</sup> The FCC’s own studies have demonstrated that the Internet is not a significant source for local news programming,<sup>237</sup> and like cable, is a weak substitute for broadcast television and radio when considering localism and diversity concerns. These statistics show that even if cable and the internet become viable alternative sources to local broadcasting and newspapers (which the Third Circuit court did not find was the case),<sup>238</sup> they may, nonetheless, be inaccessible to, or infrequently used by Spanish-language audiences at the same rate and in the same way.

It was in this media environment that the merger of Univision and Hispanic Broadcasting Corporation was reviewed and approved. Part II will lay out the issues that shaped the Univision debate from the market definitions used by the DOJ and the FCC, to the public comments and concerns that were raised when the merger was proposed. Part III will show that the FCC’s decision to approve the Univision merger was bad for localism, competition and diversity. The FCC’s failure to define the market by language was abandonment of its precedent and not in the public interest.

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<sup>234</sup> Romano, *supra* note 232, at 32. Digital cable penetration rates are also lower in the Hispanic market. *Id.*

<sup>235</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 407 (3d. Cir. 2004).

<sup>236</sup> Cara DiPasquale & Kris Karnopp, *More Web Retailers Cater to Hispanics*, CHI. TRIB., June 12, 2003, at 35.

<sup>237</sup> *Prometheus Radio Project*, 373 F.3d at 406.

<sup>238</sup> *Id.* at 405–08.

## II. THE UNIVISION DEBATE

As the history of federal regulation of foreign-language media demonstrates,<sup>239</sup> the FCC has encouraged the dissemination of foreign-language media to American audiences and has designed regulation to protect and further its distribution. The arguments raised in the merger have shaped the debate over foreign-language media regulation for the future. Part II.A will explain the methods and results of the DOJ antitrust review of the merger. Part II.B will illustrate the public comments the FCC received which argued for and against the Univision merger. Part II.C will describe the FCC's rationale in granting the license transfer in the Univision merger. Part III will however demonstrate that the FCC failed in granting the merger and its reasoning lacks credibility and support.

### *A. The Department of Justice Review of the Merger of Univision and HBC*

In 2002, Univision Communications sought to merge with Hispanic Broadcasting Corporation<sup>240</sup> through a \$3 billion<sup>241</sup> radio license transfer application to the FCC.<sup>242</sup> Due to the high costs involved and media entities involved, the merger was subject to review by the DOJ and FCC.<sup>243</sup>

The DOJ approved the merger under a conditional consent decree.<sup>244</sup> The DOJ claimed that the contemplated merger would have violated antitrust law unless certain conditions were put into

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<sup>239</sup> See *supra* Part I.

<sup>240</sup> Hispanic Broad. Corp., 17 F.C.C.R. 23717 (Nov. 22, 2002) (adopting Protective Order).

<sup>241</sup> Jeff Leeds, *Clear Channel is Expanding in Spanish Radio*, N.Y. TIMES, Sept. 17, 2004, at C1.

<sup>242</sup> Univision License Transfer, *supra* note 129, ¶ 1, at \*1.

<sup>243</sup> United States v. Univision Communications Inc., No. 1:03-CV-00758 (Mar. 26, 2003), available at <http://www.usdoj.gov/atr/cases/f200800/200878.htm> (Complaint for Injunctive Relief; citing the Clayton Act for the authority of the DOJ to review the merger) (last visited Oct. 10, 2004).

<sup>244</sup> United States v. Univision Communications Inc., No. 1:03-CV-00758 (Dec. 22, 2003), available at <http://www.usdoj.gov/atr/cases/f202100/202184.htm> (Final Judgment Civil Action, hereinafter "DOJ Final Judgment") (last visited Oct. 10, 2004).

place.<sup>245</sup> To determine if a merger is compatible with antitrust law, the agency will first define a product market, here, it was Spanish-language radio advertising<sup>246</sup> and a geographic market, here, the overlap markets of “Dallas, El Paso, Las Vegas, McAllen-Brownsville-Harlingen, Phoenix and San Jose,”<sup>247</sup> to determine if the merger will increase concentration in those defined markets.<sup>248</sup> The DOJ viewed this transaction as a merger of radio assets with no impact on television, so it did not perform any analysis of the pertinent television market. In its analysis of radio, the DOJ found that the merger would “lessen competition”<sup>249</sup> in the sale of Spanish-language radio advertising and also increased prices in the same market.<sup>250</sup> The DOJ found the merger to be in violation of § 7 of the Clayton Act<sup>251</sup> one of the principal antitrust statutes.<sup>252</sup>

To determine if there was market concentration in Spanish-language radio, the DOJ focused on Univision’s “significant and long-standing relationship”<sup>253</sup> with Entravision and Univision’s potential control of Entravision radio assets.<sup>254</sup> At the time of the proposed merger, Univision had corporate governance rights, 30% equity and a 7% voting stake in Entravision.<sup>255</sup> If the merger were

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<sup>245</sup> United States v. Univision Communications Inc., No. 03-CV-0758 at 1–2 (May 7, 2003), *available at* <http://www.usdoj.gov/atr/cases/f201000/201006.htm> (Competitive Impact Statement) (last visited Oct. 10, 2004).

<sup>246</sup> *Id.* at 5. The DOJ found that advertisers did not consider Spanish-language radio to be a “reasonable substitute” for non-Spanish-language radio or any other media. *Id.*

<sup>247</sup> *Id.* at 6.

<sup>248</sup> Cavanagh, *supra* note 53, at 72 (demonstrating the DOJ application of the 1992 Horizontal Merger Guidelines to radio mergers).

<sup>249</sup> Clayton Act, 15 U.S.C.A. §§ 12–27 (2004).

<sup>250</sup> United States v. Univision Communications Inc., No. 1:03-CV-00758 (Mar. 26, 2003), (Complaint for Injunctive Relief) *available at* <http://www.usdoj.gov/atr/cases/f200800/200878.htm> (last visited Oct. 10, 2004).

<sup>251</sup> United States v. Univision Communications Inc., No. 03-CV-0758 (May 7, 2003), (“Competitive Impact Statement”) [hereinafter “Univision Competitive Impact Statement”] *available at* <http://www.usdoj.gov/atr/cases/f201000/201006.htm> (last visited Oct. 10, 2004).

<sup>252</sup> PITOFSKY *supra* note 51, at App. [1].

<sup>253</sup> Univision Competitive Impact Statement, *supra* note 251.

<sup>254</sup> United States v. Univision Communications Inc., No. 03-CV-0758 at 3 (May 7, 2003), *available at* <http://www.usdoj.gov/atr/cases/f201000/201006.htm> (Competitive Impact Statement) (last visited Oct. 10, 2004). The broadcast affiliation agreement with Univision lasts until 2021. *Id.*

<sup>255</sup> *Id.*

consummated without conditional divestiture, competition would be reduced between HBC and Entravision.<sup>256</sup> HBC and Entravision were vigorous competitors in the Spanish-language radio market for advertisers.<sup>257</sup> There were few other competitors, so the market was highly concentrated, with HBC and Entravision's "combined share of advertising revenue ranging from 70 to 95 percent" of the market in this merger.<sup>258</sup> Univision's control and influence over both companies could therefore lessen competition, increase prices, and reduce quality of service.<sup>259</sup> Univision would not have the incentive to compete against Entravision after the merger since Univision "will benefit even if a customer chooses Entravision rather than HBC."<sup>260</sup> With no other significant competitors in the market, advertising buyers would have no choice but to ostensibly deal with Univision either through HBC or Entravision.<sup>261</sup>

Since DOJ decisions are not subject to the public debate and scrutiny of FCC decisions, the DOJ acted alone in proposing conditions to lessen Univision's ability to control Entravision and preserve competition in Spanish-language radio advertising.<sup>262</sup> Univision had to exchange all the common stock it held in Entravision for a non-voting equity interest,<sup>263</sup> so that Univision would have neither voting nor director rights in Entravision.<sup>264</sup> The Justice Department gave Univision three years to divest its interest in Entravision.<sup>265</sup> The goal was to ensure, initially, that Univision had no more than 15% of "all outstanding shares of Entravision," and after six years, that Univision would own "no more than ten percent of all outstanding shares on a fully converted basis."<sup>266</sup> Univision would be subject to these divestiture

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<sup>256</sup> *Id.* at 4.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 7.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 8.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 9; see generally DOJ Final Judgment, *supra* note 244.

<sup>263</sup> DOJ Final Judgment, *supra* note 244, at 4.

<sup>264</sup> *Id.* at 6.

<sup>265</sup> *Id.* at 4.

<sup>266</sup> *Id.* at 4–5.

requirements if it acquired any additional equity in Entravision later on.<sup>267</sup>

Univision's role in Entravision's corporate governance was also curtailed.<sup>268</sup> Univision could not influence Entravision's radio business whether through its television relationship or by communicating or receiving non-public information on Entravision's radio business.<sup>269</sup> Despite these precautions, the DOJ permitted Entravision to advertise on Univision radio and conduct joint promotions with them.<sup>270</sup> Univision could in turn advertise on Entravision as well.<sup>271</sup>

Since the DOJ's only concern was a lessening of competition, once Univision's relationship with Entravision was limited, the merger was granted. It however still required the public interest inquiry of the FCC.

*B. Public Response to the FCC on the Proposed Merger*

The Justice Department approved the merger in May of 2003.<sup>272</sup> From August 2002<sup>273</sup> until August 2003, public comments were submitted to the Commission on the subject of the Univision merger.<sup>274</sup> Ultimately, the industry filings to the FCC (by mainly Spanish Broadcasting System and Univision) shaped both sides of the dispute regarding whether Spanish-language media was a separate media market. Those against the merger offered evidence of the use and operation of Spanish-language media to demonstrate how it was a separate media market and

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<sup>267</sup> *Id.* at 5.

<sup>268</sup> *See id.* at 6–8. Univision would not be permitted to elect officers, participate in Board meetings, or “us[e] or attempt[] to use any ownership interest in Entravision to exert any influence over Entravision in the conduct of Entravision’s radio business.” *Id.* at 6–7. Univision could not prevent Entravision from changing their corporate governance documents. *Id.* at 7.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *See generally supra* Part II.A.

<sup>273</sup> Public Notice, Media Bureau Announces Assignment Of Docket No. To Proceeding Involving Applications Filed By Hispanic Broadcasting Corporation And Univision Communications, Inc. For Consent To Transfer Of Control Of Licenses And Subsidiaries, 2002 FCC LEXIS 4071 (Rel. Aug. 16, 2002).

<sup>274</sup> *See infra* Part II.B.1–2



should be regulated as such. Those in favor of the merger argued that Spanish-language media was part of the general media market and an artificial market designation otherwise would be a separate but equal standard.

### 1. Pro-Merger

Proponents of the merger argued that Spanish-language media was part of the general media market, and consolidation between these two market players would not be problematic because radio listeners and TV viewers would still have a wealth of choices.<sup>275</sup> In fact, consolidation between media players might benefit audiences by increasing the chances that a merged media entity would be able to better compete with traditional English-language radio and television networks.<sup>276</sup> These arguments were made with an understanding that Spanish and English-language media were substitutes, and therefore competitors.<sup>277</sup> Proponents also focused on the benefits that the merged company would generate.<sup>278</sup> The FCC received numerous letters from members of Congress who supported the merger because it would “promote the growth of Hispanic media”<sup>279</sup> and lead to “the goal of better competition and

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<sup>275</sup> Letter from Scott R. Flick & Roy R. Russo, Counsel to Univision & HBC, to Chairman Michael Powell, FCC, comment filed by Univision and HBC (May 14, 2003) (Proceeding 02-235) (noting that “[t]here [a]re [n]umerous [s]panish-[l]anguage [m]edia [s]ources [a]vailable to Hispanic [a]udiences”), at <http://www.fcc.gov/transaction/univision-hbc.html> (last viewed Oct. 11, 2004).

<sup>276</sup> See Letter from Congressmen Henry Bonilla & Patrick Toomey to Chairman Michael Powell, FCC (June 6, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004); Letter from Sen. Orrin Hatch to Chairman Michael Powell, FCC (July 10, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004); Letter from Rep. Ciro Rodriguez to Chairman Michael Powell, FCC (Aug. 12, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004).

<sup>277</sup> See *infra* text accompanying note 294.

<sup>278</sup> Neil Roland, *FCC Likely to Approve Hispanic Media Merger, Despite Criticism*, HOUS. CHRON., June 22, 2003, at 3.

<sup>279</sup> Letter from Rep. David Dreier to Chairman Michael Powell, FCC (June 6, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004).

stability.”<sup>280</sup> Community groups contended that the merger would “promote growth of Hispanic radio and television job[s],” capital investments in Hispanic media would increase, and the combined resources of Univision and HBC “w[ould] provide enhanced services to the Hispanic community.”<sup>281</sup>

In its FCC filings, Univision made clear that it opposed an arbitrary division of Spanish-language media from the general media marketplace—a “separate but equal” standard.<sup>282</sup> Univision posited that this was a straightforward merger of a “television company with a radio company”<sup>283</sup> that “complie[d] with all Commission rules.”<sup>284</sup> Univision argued that there was “no factual basis for artificially designating a separate Spanish-language regulatory market.”<sup>285</sup> Univision contended that competitiveness and growth of the Hispanic media sector would not be served by regulation that would “artificially retard its growth.”<sup>286</sup> Univision raised several FCC precedents where the FCC had found no separate Spanish-language media market, and Univision reasoned these decisions should not be overturned.<sup>287</sup>

Univision stated that there were no grounds to suggest Hispanic audiences would “lack adequate listening and viewing

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<sup>280</sup> Letter from Sen. Kay Bailey Hutchinson to Chairman Michael Powell, FCC (June 25, 2003) (Proceeding 02-235), at [http://gulfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gulfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004).

<sup>281</sup> See, e.g., Letter from Eugenio Carrillo, Jr., President, Stanislaus County Hispanic Chamber of Commerce, to Chairman Michael Powell, FCC (May 27, 2003) (Proceeding 02-235), at [http://gulfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gulfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004); Letter from Estela Scarlatta, Co-Founder, Bilingual Foundation of the Arts, to Chairman Michael Powell, FCC (received June 27, 2004) (Proceeding 02-235), at [http://gulfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gulfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004). They noted “Univision’s commitment to the Hispanic community” through jobs, scholarships and sponsorships of youth groups. Letter from Steven A. Soto, Mexican American Grocers Association, to Chairman Michael Powell, FCC (received June 5, 2003) (Proceeding 02-235), at [http://gulfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gulfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004).

<sup>282</sup> Letter from Scott R. Flick & Roy R. Russo (May 14, 2003), *supra* note 275.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> Letter from Scott R. Flick, Attorney for Univision, to Marlene H. Dortch, Secretary of the FCC, Response to SBS Ex Parte Filings (July 23, 2003) (Proceeding 02-235), at [http://gulfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gulfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004).

<sup>287</sup> Letter from Scott R. Flick & Roy R. Russo (May 14, 2003), *supra* note 275.

options after the merger.”<sup>288</sup> It contended that the argument “Hispanics listen only to Spanish media is a fallacy.”<sup>289</sup> Despite its oft-cited ratings record,<sup>290</sup> Univision offered up statistics showing that Hispanics “listen to and watch a broad diversity of broadcast sources,” including English-language broadcast television and radio, independent Spanish-language television stations, broadcast stations available from Mexico, Spanish-language newspapers, and Spanish-language Internet offerings.<sup>291</sup> Although it had publicly argued the opposite<sup>292</sup> to the FCC, Univision argued Spanish-language audiences use the SAP channel for viewing English-language networks.<sup>293</sup> Univision had noted in several press reports that it needed HBC to compete with the English-language networks.<sup>294</sup> Univision argued that this merger would add to the diversity of choices in the market and not reduce the number of Spanish radio stations available.<sup>295</sup> Univision claimed that radio station format changes from “English to Spanish [a]re [c]ommon,”<sup>296</sup> suggesting a functional substitutability between the formats, and that the number of Spanish-language radio stations was on the rise.<sup>297</sup> Moreover, HBC and Univision had committed themselves to build more “listening and viewing options” through the conversion of new stations to Spanish format and not through consolidation of existing stations.<sup>298</sup>

Univision opposed those competitors taking a position against the merger. Univision criticized SBS, on procedural grounds, for conducting its challenges to the merger through 2000 pages of ex

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> Chunovic, *supra* note 191, at 16.

<sup>291</sup> Letter from Scott R. Flick & Roy R. Russo (May 14, 2003), *supra* note 275.

<sup>292</sup> Chunovic, *supra* note 191, at 16.

<sup>293</sup> Letter from Scott R. Flick & Roy R. Russo (May 14, 2003), *supra* note 275.

<sup>294</sup> *FCC Probably Will Approve Univision Purchase*, ST. LOUIS POST-DISPATCH (June 22, 2003) at E-8.

<sup>295</sup> See *infra* note 298 and accompanying text.

<sup>296</sup> Letter from Scott R. Flick & Roy R. Russo (May 14, 2003), *supra* note 275.

<sup>297</sup> *Id.* HBC’s radio offerings targeted at Hispanic listeners are programmed in Spanish, English and they are offered in bilingual formats as well. *Id.* Audiences and stations are freely moving between both formats. *Id.*

<sup>298</sup> *Id.*

parte presentations, instead of filing a petition to deny.<sup>299</sup> To file a petition to deny, a party must raise “specific allegations of fact sufficient to show that . . . a grant of the application would be *prima facie* inconsistent with [the public interest].”<sup>300</sup> There is a high burden of proof on the petitioning party<sup>301</sup> and “[g]eneral or conclusory allegations or those based simply on belief are not sufficient.”<sup>302</sup> However, *ex parte* presentations “[are] not served on the parties to the proceeding, or, if oral, [are] made without advance notice to the parties and without opportunity for them to be present.”<sup>303</sup> Univision also attacked SBS for inconsistencies in its filings<sup>304</sup> and ignorance of the FCC case law<sup>305</sup> in which the FCC states that “it will not consider a stations’ programming format in processing . . . transfer applications.”<sup>306</sup> Univision attacked Telemundo for many of the same things, labeling them as

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<sup>299</sup> Letter from Scott. R. Flick (July 23, 2003), *supra* note 286.

<sup>300</sup> Telemundo Communications Group, 17 F.C.C.R. 6958, ¶ 7, 6962 (2002) (quoting *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985) (citing 47 U.S.C. § 309(d)(1) (1982))).

<sup>301</sup> *Id.* ¶ 7, at 6962 (describing the substantial process to succeed on a petition to deny filing). “Under Section 309(d) of the Communications Act, there is a two-step test for determining whether a petition to deny raises issues requiring that a transfer or assignment application be designated for hearing. First, the petition to deny must set forth ‘specific allegations of fact sufficient to show that . . . a grant of the application would be *prima facie* inconsistent with [the public interest].’ Second, if the Commission concludes, based upon the totality of the evidence, that there is a ‘substantial and material question of fact’ concerning whether the grant of the application would serve the public interest it must formally designate the application for a hearing in accordance with Section 309(e) of the Communications Act.” *Id.*

<sup>302</sup> Univision License Transfer, *supra* note 129, ¶ 53, at \*62.

<sup>303</sup> FCC, *Ex Parte Fact Sheet*, “What is an Ex Parte Presentation,” [http://www.fcc.gov/ogc/admain/ex\\_parte\\_factsheet.html](http://www.fcc.gov/ogc/admain/ex_parte_factsheet.html) (last viewed Nov. 4, 2004). Though the FCC promulgates Ex Parte Rules to govern this procedure. See FCC, FCC’s Ex Parte Rules at <http://www.fcc.gov/ogc/xprte.html> (last viewed Nov. 5, 2004).

<sup>304</sup> Letter from Scott. R. Flick (July 23, 2003), *supra* note 286, at 4–5.

<sup>305</sup> *Id.* at 8. Additionally, Univision claimed that SBS’s call for costly “case-by-case review” was out of step with the Commission’s recent 2002 biennial review upholding a bright-line test. See *id.* at 9. The SBS cited case law stating that “the [FCC] has sought to encourage the growth of minority-oriented programming, including Spanish-language programming, and have nothing to do with treating such programming as part of a separate market for multiple ownership purposes.” *Id.* at 10.

<sup>306</sup> *Id.* at 10.

another “jilted suitor” of HBC.<sup>307</sup> It challenged Telemundo’s accusation that the merger would lead to a Univision monopoly of viewpoints, asserting that the percentage of Univision’s audience share of Hispanic viewing was completely wrong.<sup>308</sup> Telemundo claimed that Univision’s share was 70% of the Hispanic audience, while Univision claimed its share was only 20%.<sup>309</sup> It disagreed with Telemundo’s claim that its thirteen-year exclusive content deal with Televisa<sup>310</sup> was not in the public interest<sup>311</sup> and suggested Telemundo’s failure to beat Univision in the ratings had little to do with the Televisa programming, which accounts for only one-third of Univision’s line-up.<sup>312</sup> Univision, as the television market leader, did not consider the claims raised by Telemundo, its oft second-place competitor, to accurately reflect the issues raised by the merger. Univision argued it was not a monopoly under the FCC broadcast ownership rules and even with these additional radio stations, it would still be in compliance with those language-neutral rules.

At the same time, Univision sought the continued protection of its business from the network representation rule, which is applicable only to Spanish-language broadcasters. Univision vociferously protested any effort by the FCC to change the status of the permanent waiver to national spot sales as a condition to the merger with HBC.<sup>313</sup> It threatened that any effort to remove this waiver could lead to public harm and “the loss of local Spanish-language television programming and stations.”<sup>314</sup> Furthermore, there could be “disruption to investment in Spanish-formatted

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<sup>307</sup> Letter from Scott R. Flick & Roy L. Russo, Attorneys for Univision & HBC, to Marlene H. Dortch, Secretary of the FCC (Aug. 27, 2003) (Proceeding 02-235), at [http://gulfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gulfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> Elisabeth Malkin, *Mexico Media Mogul Follows the Money*, N.Y. TIMES, Feb. 27, 2004, at W1 (“Univision has exclusive rights to Televisa’s programs until 2017.”).

<sup>311</sup> Letter from Scott R. Flick & Roy L. Russo (Aug. 27, 2003), *supra* note 307.

<sup>312</sup> *Id.*

<sup>313</sup> Letter from Scott R. Flick, Attorney for Univision, to Marlene H. Dortch, Secretary of the FCC (Sept. 8, 2003) (Proceeding 02-235), at [http://gulfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gulfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004).

<sup>314</sup> *Id.*

television operations.”<sup>315</sup> In addition, Entravision, a third party to the merger, would likely suffer the “greatest harm from its elimination.”<sup>316</sup> It could harm affiliates in the smallest markets that are less likely to get national spot sales otherwise, and there is “no ready substitute for Univision’s national sales representation service . . . available to Entravision or other affiliates.”<sup>317</sup> Thus, Univision said that all of the public interest reasons on which the waiver was premised still existed.<sup>318</sup> More importantly, the elimination of the waiver had “no conceivable connection to the HBC merger.”<sup>319</sup> Though Univision opposed the argument that Spanish-language media was a separate media market, and it did not want a separate-but-equal regulation regime to be installed, it continued to seek unique protection from the national representation rule which had been granted only to Spanish-language broadcasters. Its advocacy continued to protect Entravision, who operated the most Univision affiliates, since Univision’s television interests continued to be intertwined with Entravision’s, although the DOJ had curtailed its influence over Entravision’s radio holdings.

## 2. Anti-Merger

Many opponents of the merger argued that Spanish-language media is a separate media market, and if the FCC permitted Univision to merge with HBC, consolidation by the leading TV and radio entities would significantly reduce competition within the Spanish-language media market.<sup>320</sup> If one corporation were to dominate all Spanish-language media, questions of programming, source, and viewpoint diversity will be at issue.<sup>321</sup> Members of the public opposed the merger on the grounds that programming diversity will be harmed and it would be harder for new entities,

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> Letter from Sen. Tom Daschle to Chairman Michael Powell, FCC (May 6, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 10, 2004).

<sup>321</sup> *Id.*

especially Hispanic ones, to enter the market.<sup>322</sup> Public interest groups and legislators were also concerned that the merger would make future entry into the marketplace more difficult.<sup>323</sup> Several Senators urged the Commission to make a study of the Spanish-language media market before approving the Univision merger.<sup>324</sup> The Congressional Hispanic Caucus asked the Commission to “carefully review the full impact that this merger will have on the Hispanic community.”<sup>325</sup>

Since review of the Univision merger coincided with the biennial review of media ownership rules, concerns over media

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<sup>322</sup> A public letter-writing campaign contributed 5,553 letters from Hispanic-Americans opposing the merger. *See* Letter from Arthur Belendiuk, Counsel for NHPI, to Marlene H. Dortch, Secretary of the FCC (July 28, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 10, 2004); Letter from Arthur Belendiuk, Counsel for NHPI, to Marlene H. Dortch, Secretary of the FCC (July 29, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 10, 2004) (The letters, in Spanish and English, spoke to the participant’s concern that the Univision merger would “limit opportunities for Hispanic-Americans to receive diverse news information and cultural programming,” “[would] damage [their] culture,” “limit competition” and “make it more difficult for Hispanic-Americans to start their own companies” in television and radio.). *But see supra* note 281 and accompanying text (describing letters in favor of the merger).

<sup>323</sup> *See* Letter from Sen. Edward Kennedy et al., *infra* note 324. The Media Access Project (“MAP”), a public interest telecommunications law firm, made ex parte presentations to draw the Commission’s attention to the barriers-to-entry problems in the Spanish-language media market. Letter from Andrew Jay Schwartzman, President & CEO, Media Access Project, to Chairman Michael Powell and Commissioners, FCC (July 25, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 10, 2004).

<sup>324</sup> *See* Letter from Sen. Patrick Leahy & Sen. James Jeffords to Chairman Michael Powell, FCC (May 20, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 10, 2004); Letter from Sen. Hillary Rodham Clinton to Chairman Michael Powell, FCC (May 7, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 10, 2004); Letter from Sen. Edward Kennedy et al. to Chairman Michael Powell, FCC (May 15, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 10, 2004); Letter from Sen. Patrick Leahy & Sen. James Jeffords to Chairman Michael Powell, FCC (May 20, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 10, 2004); Ballve, *supra* note 194, at 20 (describing the Capitol Hill political debate that the Univision merger generated).

<sup>325</sup> Letter from Rep. Robert Menendez et al. to Chairman Michael Powell, Sept. 17, 2002, at 1, *available at* [http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6513307688](http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513307688).

consolidation had become the subject of much debate in Washington.<sup>326</sup> Before the merger was approved, some complained that the merger would create a “monolith that would dominate Hispanic media and entertainment.”<sup>327</sup> N.Y. State Sen. Efrain Gonzalez Jr., the President of the National Hispanic Policy Institute, likened Univision to Shamu and predicted “It [would] eat[] all the little fish.”<sup>328</sup> Additionally, with the combined assets of Univision and HBC, Univision would have a “lock on two-thirds of all Spanish-language advertising in the U.S.”<sup>329</sup>

Many of the filings made to the FCC by Spanish Broadcasting System (“SBS”) argued that Spanish-language media is a separate media market and attempted to prove that all parties in the industry and even the FCC had acknowledged this fact in the past.<sup>330</sup> SBS argued that despite the FCC’s general belief that television and radio do not compete with one another, the FCC needed to address competitive connections in advertising between Spanish-language television and Spanish-language radio.<sup>331</sup>

SBS contended that Spanish-language radio stations need to advertise on Spanish-language television to be able to capture a significant audience.<sup>332</sup> If the merger were approved, SBS did not want Univision to discriminate against other radio stations and refuse to sell advertising to them, as competitors of HBC.<sup>333</sup>

SBS demonstrated this interconnectedness between Spanish-language radio and television by submitting Univision and HBC marketing materials which each individually stressed that they

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<sup>326</sup> See Letter from Sen. Patrick Leahy & Sen. James Jeffords to Chairman Michael Powell, FCC (May 20, 2003) (Proceeding 02-235) at [http://gulfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gulfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 10, 2004); see Ballve, *supra* note 194, at 20.

<sup>327</sup> Ballve, *supra* note 194, at 20.

<sup>328</sup> James & Leeds, *supra* note 170, at 1 (quoting N.Y. State Sen. Efrain Gonzalez Jr.).

<sup>329</sup> *Id.* at 1.

<sup>330</sup> See *supra* text accompanying notes 340–46.

<sup>331</sup> Letter from Philip L. Verveer & Bruce A. Eisen, Attorneys for SBS, to Marlene H. Dortch, Secretary of the FCC (June 3, 2003) (Proceeding 02-235), at [http://gulfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gulfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 10, 2004).

<sup>332</sup> *Id.* SBS claimed that to launch several of its own radio stations, it needed to launch numerous expensive advertising campaigns on Spanish-language television stations. *Id.*

<sup>333</sup> *Id.* at 2.



“compet[e] with each other for advertising revenue.”<sup>334</sup> Here, HBC and Univision took the perspective that, for advertising purposes, Spanish language radio and television were substitutable.<sup>335</sup> SBS submitted a Lehman Brothers report which stated that, from 1991 to 2002, Spanish language radio ad revenue had lost ground in its competition with Spanish-language television.<sup>336</sup> SBS reasoned that the competitive reality of the Spanish-language market was that Spanish-language radio and television compete with one another.

SBS submitted statements from over twenty advertising agencies and advertisers who all agreed that English-language broadcasting and Spanish-language broadcasting constitute separate markets.<sup>337</sup> One advertising sales executive who had been involved with Spanish-language media for forty-two years acknowledged several situations where advertisements were pulled because the buyer did not want to buy “Spanish radio” but radio or “television not Spanish television.”<sup>338</sup> A thirty-one year advertising veteran noted that advertisers in the Spanish-language

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<sup>334</sup> Letter from Philip L. Verveer et al., Attorneys for SBS, to Marlene H. Dortch, (June 16, 2003) (Proceeding 02-235), at 6, *available at* [http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6514183066](http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514183066) (last visited Nov. 4, 2004).

<sup>335</sup> *Id.*

<sup>336</sup> Letter from Philip L. Verveer et al., Attorneys for SBS, to Marlene H. Dortch, (June 23, 2003) (Proceeding 02-235), at 2, *available at* [http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6514282032](http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514282032) (last visited Nov. 4, 2004).

<sup>337</sup> Letter from Philip L. Verveer & Bruce A. Eisen (June 3, 2003), *supra* note 331. Jeffrey H. Smulyan, Chairman and CEO of Emmis Communications Corp. stated that in his twenty-five years of radio experience “English language and Spanish language radio stations do not generally compete with each other” and advertising markets and budgets are totally separate. Letter from Jeffrey H. Smulyan to Secretary Marlene H. Dortch, Secretary of the FCC (July 11, 2003) (Proceeding 02-235), *at* [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004). His radio stations do not take into consideration the Spanish-language stations when setting their ad rates. *Id.* See Letter from Philip L. Verveer et al., Attorneys for SBS, to Marlene H. Dortch, Secretary of the FCC, Declaration of Alan Sokol (July 14, 2003) (Proceeding 02-235), *at* [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004).

<sup>338</sup> Letter from Philip L. Verveer & Bruce A. Eisen, Attorneys for SBS, to Marlene H. Dortch (June 2, 2003), at 6–7 (referring to letter from Eduardo Caballero to Chairman Michael Powell, May 27, 2003), *available at* [http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6514156470](http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514156470).

market often substituted Spanish-language television and Spanish-language radio but did not shift advertising from English to Spanish or Spanish to English just because of price changes.<sup>339</sup> These advertising business customs reflect a marketplace where Spanish-language radio is interchangeable with Spanish-language television. This demonstrates a flexibility between radio and television unseen in English-language media, because of the unique variant of audience language.

SBS, submitted cases in which the FCC itself recognized the “specialized status of Spanish and other minority languages” therefore the designation of separate Spanish-language media market would be in line with Commission precedent.<sup>340</sup> SBS argued that the idea that Spanish-language is merely a format was undermined by thirty years of FCC decisions.<sup>341</sup> The FCC had, on several occasions, protected Spanish-language media by specific regulations namely, the spot sales waiver,<sup>342</sup> cable carriage specialty signals, the must-carry rules, newspaper/broadcast television cross-ownership rules<sup>343</sup> and in two specific cases that Univision cited in its filings, *Spanish Radio Network* and *Brawley Broadcasting*.<sup>344</sup> SBS argued that the Commission’s position in *Spanish Radio Network* could be viewed as the multiple ownership rules are based on evaluating market concentration and entry

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<sup>339</sup> *Id.* at 4–5 (referring to letter from Castor A. Fernandez to Chairman Michael Powell, May 27, 2003).

<sup>340</sup> See Letter from David M. Don, Counsel for SBS, to Marlene H. Dortch, Secretary of the FCC, Ex Parte Presentation to Commissioner Copps (June 17, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004).

<sup>341</sup> Letter from Michael G. Jones et al., Attorneys for SBS, to Marlene H. Dortch, Secretary of the FCC (June 26, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004).

<sup>342</sup> See *supra* notes 127–56 and accompanying text.

<sup>343</sup> Letter from David M. Don (June 17, 2003), *supra* note 340. The presentation cited the case of Telemundo Communications Inc., 17 F.C.C.R. 6958 (2002); see *supra* notes 115–26 and accompanying text for more information on this opinion. They also noted cable carriage history. See *supra* notes 157–64 and accompanying text.

<sup>344</sup> Letter from Michael G. Jones et al. (June 26, 2003), *supra* note 341. SBS also noted that in *Brawley Broadcasting*, 13 F.C.C.R. 21119 (1998), the FCC’s decision to waive the one-to-a-market rule for Entravision was due in part to the anticipated creation of improved Spanish-language programming options. *Id.*

barriers in English language broadcasting only<sup>345</sup> and they are not designed to properly assess Spanish language media.<sup>346</sup> SBS argued that through the business practices of advertising, through the language of the targeted audiences, and throughout FCC precedent, Spanish-language media could be distinguished as a separate media market and needed to be regulated as such.

Telemundo made *ex parte* presentations to the Commissioners opposing the Univision merger on the grounds of its impact on diversity and competition.<sup>347</sup> Telemundo's concerns focused on the potential anticompetitive effects of the merger.<sup>348</sup> Much like SBS, it didn't want to be denied access to advertising opportunities on HBC radio stations because it had been denied access to Entravision stations before.<sup>349</sup> Telemundo sought merger conditions that would protect competitive access to talent and radio promotion and prohibit joint sales.<sup>350</sup> Collectively, the parties against the merger demonstrated that the merger was not in the public interest and significant anticompetitive harms would arise from it.<sup>351</sup> Even though SBS was a competitor of HBC, it raised evidence of FCC precedent to support its thesis that Spanish-language media existed as a separate and distinct market apart from English-language media and the FCC itself had recognized that before.<sup>352</sup> The FCC reviewed the comments filed by SBS, Univision, Telemundo, Congressmen, Senators, and the public at large to conclude that the merger of Univision and HBC was in the public interest.<sup>353</sup>

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<sup>345</sup> Letter from Philip L. Verveer et al., Attorneys for SBS, to Marlene H. Dortch (June 26, 2003), at 2, available at [http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6514282534](http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514282534).

<sup>346</sup> *Id.*

<sup>347</sup> Letter from F. William LeBeau, Counsel to Telemundo, to Marlene Dortch, Secretary of the FCC, Ex Parte Presentation (Aug. 21, 2003) (Proceeding 02-235), at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (last visited Oct. 11, 2004).

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> See *supra* notes 320–50 and accompanying text.

<sup>352</sup> See *supra* notes 330–46 and accompanying text.

<sup>353</sup> See *infra* notes 354–412 and accompanying text.

*C. Final FCC Review of the Merger of Univision and HBC*

The FCC approached the merger as the Justice Department did, under the perspective that it was simply a transfer of radio assets,<sup>354</sup> and it maintained its longtime stance that radio and television advertising do not compete with each other.<sup>355</sup> Therefore the only competitive review required was in the radio market.<sup>356</sup> The FCC looked to the broadcast ownership rules to determine whether the license transfers would be permissible under the competitive guidelines laid out in the rules.<sup>357</sup> In the end, it decided that Spanish-language media should not be considered a separate media market for broadcast ownership purposes.

*1. Broadcast Ownership Rules*

Because the merger would result in a combination of Univision television assets and HBC radio assets in overlap markets, the FCC applied the radio-television cross-ownership rule<sup>358</sup> and found that the all the license transfers were permissible.<sup>359</sup> Univision complied in most areas with local radio ownership rule,<sup>360</sup> but in two markets, Houston and Albuquerque, Univision would own one more station than was permitted.<sup>361</sup> The FCC required divestiture of the two stations within six months if the stay of judgment was

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<sup>354</sup> See *supra* text accompanying note 246 (stating that the relevant product market was Spanish-language radio advertising).

<sup>355</sup> The FCC has “generally assumed, in [their] competition analyses of radio transactions, that radio and television stations do not compete in the same product market, an approach the DOJ has generally followed.” Univision License Transfer, *supra* note 129, ¶ 59, at \*68.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* ¶¶ 7–11, at \*\*8–16.

<sup>358</sup> *Id.* ¶¶ 7–8, at \*\*8–9. Note that the 2002 Biennial Review eliminated the radio-television cross-ownership rule. 3 ZUCKMAN, *supra* note 10, § 14.4, at 50. At this point in the Commission’s review they are using the old rules. See 3 ZUCKMAN, *supra* note 10, § 14.4, at 47, 49, 51, 155–59 (West Prac. ed. 1999 & Supp. 2004) (describing the newspaper-broadcast and broadcast-cable cross-ownership rule).

<sup>359</sup> Univision License Transfer, *supra* note 129, ¶ 9, at \*12.

<sup>360</sup> The Commission noted in the Univision decision that it was applying the new 2002 biennial rules for the radio multiple ownership part of the Univision merger. *Id.* ¶ 11, at \*\*15–16. But it did not apply the new rules for the cross-ownership section of the decision. See *supra* note 358.

<sup>361</sup> Univision License Transfer, *supra* note 129, ¶ 11, at \*\*15–16. Univision would control six FM stations and one AM station. *Id.*

lifted by the Third Circuit in the *Prometheus Radio Project* case or the 2002 biennial rules went into effect.<sup>362</sup>

## 2. Attribution

Since the FCC must review the broadcaster's ownership it will determine what parties have an ownership stake in the entity. The only owners that will be considered attributable for purposes of the FCC ownership rules, however, are those that confer a "degree of influence or control such that the holders [of such control] have a realistic potential to affect the programming decisions of licensees or other core operating functions."<sup>363</sup> The National Hispanic Policy Institute ("NHPI") filed a petition to deny against the merger and focused mainly on the "relationships between Clear Channel, HBC, Univision and Entravision"<sup>364</sup> and their attributable interests.<sup>365</sup> NHPI was concerned about Clear Channel's "26 percent nonvoting equity interest in HBC"<sup>366</sup> and Univision's ownership of 9.86% of Entravision's voting stock.<sup>367</sup> NHPI was troubled that separation of ownership between these companies was an illusion and that Univision would continue to control Entravision, while Clear Channel would exercise control over HBC.<sup>368</sup> The FCC reviewed the attributable control of shareholders within Univision and HBC. Overall, the Commission did not find a problem with Clear Channel's ownership interest in HBC.<sup>369</sup> Though after the merger Clear Channel's non-voting

<sup>362</sup> *Id.* ¶ 11, at \*16 (noting, however, that this decision was under the new ownership rules that were under a stay of execution at the time they were applied). Yet one year later, the new local television rule was partially remanded to the Commission by the Third Circuit because the numerical limits set by the FCC were not well-reasoned or supported. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 420 (3d Cir. 2004).

<sup>363</sup> In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, 14 F.C.C.R. 12559, ¶ 1, 12560 (Aug. 6, 1999).

<sup>364</sup> Univision License Transfer, *supra* note 129, ¶ 12, at \*16.

<sup>365</sup> *Id.* ¶ 12, at \*16.

<sup>366</sup> *Id.* ¶ 13, at \*19.

<sup>367</sup> *Id.* ¶ 37, at \*44.

<sup>368</sup> *Id.* ¶ 12, at \*16.

<sup>369</sup> *Id.* ¶¶ 28–29, at \*35. Clear Channel's interest in HBC had been previously reviewed by the Commission, which found that the interest was not attributable. *Id.* ¶ 13, at \*19. However, Clear Channel itself has attracted attention from federal authorities because of the immense growth of its radio holdings since the passage of the Telecom Act of 1996. See Alicia Mundy, *Score One for Regulators*, CABLE WORLD, Jul. 28, 2003, at 3

interest in HBC would be converted into a 3.66% voting stock interest in Univision,<sup>370</sup> any voting interest below 5% is considered nonattributable under FCC rules.<sup>371</sup>

NHPI also raised ire over Clear Channel's appointees on HBC's Board of Directors.<sup>372</sup> However, the FCC determined that the two appointees at issue had been independently elected to the board,<sup>373</sup> and that there was no evidence to support allegations that it would influence the HBC Board on behalf of Clear Channel.<sup>374</sup> NHPI argued that Clear Channel would have de facto control over HBC and would exercise the same over Univision,<sup>375</sup> but the FCC found that NHPI's petition to deny failed to raise a "substantial and material question of fact."<sup>376</sup>

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(remarking that Clear Channel played a large role in the media consolidation debate, especially in Congress, where it was viewed as "the poster child for Big Media Gone Bad. Almost every member of Congress cited Clear Channel as the bete noir that spurred their vote."). Clear Channel, the industry leader in radio station ownership, owned thirty-six radio stations before the passage of the 1996 Act, and by 2003, 1225 stations. Jeff Leeds, *Clear Channel: An Empire Built on Deregulation*, L.A. TIMES, Feb. 25, 2002, at B1. The allegations NHPI made of anti-competitive behavior on the part of Clear Channel in its dealings with SBS were dismissed by the FCC as conclusory and unsupported. Univision License Transfer, *supra* note 129, ¶¶ 28–29, at \*35.

<sup>370</sup> *Id.* ¶ 14, at \*\*20–21.

<sup>371</sup> *Id.* Clear Channel would also comply with the FCC's rule on Equity/Debt for attribution. Here attribution can attach if an "investor either (1) supplies over 15% of a station's total weekly broadcast programming hours, or (2) is a same-market media entity subject to the broadcast multiple ownership rules, its interest in the licensee or other media entity in that market will be attributable if that interest, aggregating both debt and equity, exceeds 33% of the total asset value of the licensee or media entity." *Id.* at \*21 (citing 47 C.F.R. § 73.3555, Note 2(a) (2003)). Clear Channel argued that its combined debt and equity would not exceed 33% and NHPI did not proffer evidence to rebut this. *Id.*

<sup>372</sup> *Id.* ¶ 16, at \*23. The Commission considers "an investor's relationship to an entity's Board of Directors" when ascertaining the potential attribution of influence. *Id.*

<sup>373</sup> *Id.* ¶ 18, at \*24. "They work for financial institutions that provided banking services for Clear Channel." *Id.*

<sup>374</sup> *Id.* ¶ 18, at \*25.

<sup>375</sup> *Id.* ¶ 19, at \*25. This too was previously argued in *Shareholders AMFM Inc.* and dismissed. *Id.* ¶ 19, at \*26.

<sup>376</sup> *Id.* ¶ 25, at \*\*31–32. NHPI failed to explain how Clear Channel's 3.66 percent voting interest could be overcome by Univision's single-majority shareholder, Jerrold Perenchio. *Id.*

Both NHPI and the FCC had initial concerns over Univision's governance and control of Entravision,<sup>377</sup> but the DOJ addressed many of these concerns in its Consent Decree.<sup>378</sup> The FCC concluded that compliance with the DOJ decree would cause all relevant concerns as to Univision's control of Entravision to be moot.<sup>379</sup> Even though the FCC attributed Entravision television to Univision, Univision was still in compliance with the radio/television cross-ownership rule.<sup>380</sup> NHPI challenged the Commission's findings,<sup>381</sup> but the FCC determined that Univision's interest in Entravision did not exceed 33% and therefore complied with the FCC attribution standard.<sup>382</sup>

### 3. Monopoly

Beyond the petitions to deny proffered by NHPI, Elgin FM Limited Partnership ("Elgin") raised informal objections in the Univision proceeding.<sup>383</sup> Elgin owned three radio stations which competed with HBC in Texas and was concerned that the merger would create "a Spanish language media monopoly."<sup>384</sup> Elgin's fears were that Clear Channel's dominant ownership of entertainment venues, combined with Univision's influence in music entertainment, would prevent an unaffiliated company like Elgin, from being involved with a music event or creating synergies that could compete with "media giants" Univision and Clear Channel."<sup>385</sup> The Commission again did not find that Elgin

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<sup>377</sup> *Id.* ¶¶ 39, 43, at \*45, \*\*49–50 (revealing that the FCC staff requested further information from Univision to determine attribution). NHPI argued that the rights retained by Univision would not only be attributable, but would also give Univision de facto control over Entravision. *Id.* ¶ 41, at \*46.

<sup>378</sup> *Id.* ¶ 40, at \*46.

<sup>379</sup> *Id.* ¶ 41, at \*47.

<sup>380</sup> *Id.* (noting that Univision also would comply with the new 2002 biennial cross-media limits).

<sup>381</sup> NHPI argued that because "Univision acts as Entravision's exclusive national advertising representative firm," Univision's continued influence should demand attribution. *Id.* ¶ 49, at \*58. However, the FCC no longer uses advertising representation as a guideline for attribution. *Id.* ¶ 50, at \*59. Instead, it uses the EDP standard to consider attribution. *Id.* See *supra* note 371 (explaining the Equity Debt Plus standard).

<sup>382</sup> *Id.* ¶ 47, at \*56.

<sup>383</sup> *Id.* ¶ 52, at \*60.

<sup>384</sup> *Id.* ¶ 52, at \*60.

<sup>385</sup> *Id.* ¶ 52, at \*61.

argued with the requisite specificity.<sup>386</sup> Even in arguing that the merger is anti-competitive, Elgin did not argue how “Univision [would] be able to control Spanish language entertainment as a whole” and how Elgin would be harmed.<sup>387</sup>

The FCC also dismissed the concerns over anti-competitive behavior raised by Telemundo and the Media Access Project (“MAP”).<sup>388</sup> The MAP and Telemundo’s accusations involved Univision’s policy that made it hard for “competitors to hire Univision’s TV personalities or obtain marquee programming.”<sup>389</sup> Newspaper reports suggested that Univision personalities were not permitted to appear on Telemundo under any circumstances.<sup>390</sup> There were allegations of Univision “preclud[ing Telemundo] from promoting its programming on Entravision’s radio stations.”<sup>391</sup> However, the Commission was “not convinced that the practices alleged by Telemundo and MAP, even if true, [would] translate into competitive harms.”<sup>392</sup>

#### 4. Separate Media Market

The FCC believed SBS was arguing for a Spanish-language submarket and advocating for the FCC to review the effects of the merger on Spanish-speaking audiences.<sup>393</sup> Under those circumstances, the FCC refused “to limit or condition [its] approval of this transaction on the basis of [the] purported impact on Spanish-speaking audiences.”<sup>394</sup> The FCC found that SBS did not make a strong enough argument to overcome the Commission’s longtime “reluctance to define product markets based on programming format or language.”<sup>395</sup> The Commission

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<sup>386</sup> *Id.* ¶ 53, at \*61.

<sup>387</sup> *Id.* ¶ 54, at \*63.

<sup>388</sup> *Id.* ¶ 54, at \*64 n.107.

<sup>389</sup> *Id.*

<sup>390</sup> Porter, *supra* note 181, at B1.

<sup>391</sup> Univision License Transfer, *supra* note 129, ¶ 54, at \*64 n.107.

<sup>392</sup> *Id.* ¶¶ 56–57, at \*\*66–67.

<sup>393</sup> *Id.* ¶ 57, at \*67.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* ¶ 58, at \*67; *see* Part I.B.2 ( discussing the history of format disputes and the Commission’s current stance). *But see* Part I.B (demonstrating the Commission’s past considerations of language in media regulation).



also restated its longstanding belief that radio and television stations do not compete in the same product market, which is also consistent with the DOJ's position.<sup>396</sup> The FCC refuted evidence of a separate Spanish-language media market as anecdotal and unconvincing.<sup>397</sup> Since Univision did not own any radio stations, the merger with HBC would not create undue radio concentration.<sup>398</sup>

If the Spanish-language media market was deemed separate, a proper competitive analysis would include the other market participants and the ease of entry into the market.<sup>399</sup> The FCC considered Telemundo a direct and worthy competitor of Univision.<sup>400</sup> With GE/NBC behind it, Telemundo would have the finances, resources and expertise to compete in this market.<sup>401</sup> Even if the FCC was concerned with competition in a separate Spanish-language media market, Telemundo was sufficient competition.

In determining diversity, the FCC examined all of the media outlets that target Hispanics.<sup>402</sup> The FCC argued that bilingual viewers have more outlets and alternatives for viewpoints than the rest of the population.<sup>403</sup> Even looking only at Spanish-language programming, there was not a "single gatekeeper" to diversity, with the existence of local Spanish newspapers, Spanish radio, Second Audio Program television broadcasting, and cable/satellite options.<sup>404</sup> The FCC contended that programming available to Spanish-speaking audiences today is growing and substantial<sup>405</sup> and expected that cable would provide many more Spanish outlets in the future.<sup>406</sup> The FCC found that barriers to entry in Spanish-language radio had been demonstrably low, as evinced by the

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<sup>396</sup> *Id.* ¶ 59, at \*68.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* ¶ 59, at \*69.

<sup>399</sup> *Id.* ¶ 60, at \*70.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* ¶ 62, at \*73.

<sup>403</sup> *Id.* ¶ 63, at \*76 (based on statistics collected by the Tomas Rivera Policy Institute).

<sup>404</sup> *Id.* ¶ 64, at \*76.

<sup>405</sup> *Id.* ¶ 60, at \*70.

<sup>406</sup> *Id.* ¶ 60, at \*71.

increased number of radio stations introduced in the Spanish format between 2001 and 2002.<sup>407</sup> The Commission's study found that 163 stations switched to the Spanish-language format.<sup>408</sup> The FCC viewed this as evidence that entry into the Spanish-language radio market was not difficult at all: a radio station owner could simply buy an English-language station and convert the format from English to Spanish.

After consideration of evidence from both advocates and detractors of the merger, the FCC approved the license transfer finding it was in public interest and convenience.<sup>409</sup> It found there were no barriers to entry in the market,<sup>410</sup> diversity would not be undermined,<sup>411</sup> and there would be no shortage of media outlets available to Spanish speaking audiences.<sup>412</sup> Univision, in one single moment, became the leading Spanish-language television company and radio company, and with that, one more market player left the playing field. Part III recognizes that this moment was a step in the wrong direction for the FCC, an abandonment of the public interest, and ignorance of the fact that Spanish-language audiences would seriously be affected by this change. Varied ownership leads to viewpoint diversity. The FCC consistently repeats this mantra, however Spanish-language ownership is less varied today and viewpoint diversity is even more shallow.

### III. WHY THE UNIVISION MERGER WAS A FAILURE IN THE PUBLIC INTEREST

The FCC's approval of the Univision merger was not in the public interest. The FCC did not take into consideration competition, localism and diversity for the audience affected by the merger—the Spanish-speaking audience. All FCC decisions must be well-reasoned and Part III will show that the FCC's reasoning in the Univision merger was flawed and implausible. The FCC did

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<sup>407</sup> *Id.* ¶ 61, at \*72.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.* ¶ 67, at \*79.

<sup>410</sup> *Id.* ¶ 65, at \*78.

<sup>411</sup> *Id.* ¶ 67, at \*79.

<sup>412</sup> *Id.* ¶ 65, at \*78.

not properly consider the arguments presented to them by the Department of Justice, academic scholars, market participants or the consuming public. It even contradicted its own history. Spanish-language media forms a unique and distinct market and the FCC blatantly chose to ignore this evidence.

*A. Language as a Factor of Analysis*

The FCC could have looked to its earlier holdings and recognized that language plays a vital role in regulatory decisions. Despite the FCC claims that it does not use language as a factor for ownership analysis, it has used this standard on numerous occasions.

1. Diversity and Competition

The FCC has stated that “[t]hose whose primary language is not English deserve the same protections of diversity and competition as do English speakers”<sup>413</sup> and in the 2002 biennial review, the FCC announced its intention to focus on the effects of competition on the public,<sup>414</sup> since its “duty as an agency runs to consumers.”<sup>415</sup> The FCC failed, however, to apply these two policies, in tandem, to the Univision merger. Spanish-speaking consumers were not the focus of the FCC’s competition analysis. In the Univision merger, *all consumers* were included in the FCC’s evaluation because it improperly defined the merger’s market based on a language-neutral audience.<sup>416</sup> But a broadcaster’s audience, and how it is targeted, is based on language when the broadcast language is Spanish. The FCC has acknowledged that Spanish broadcasting only attracts and interests those who speak the language.<sup>417</sup> The Commission has said that “a program broadcast in a foreign language is of little interest to any but those fluent, in the language.”<sup>418</sup> Audience reach cannot be calculated as language-neutral if the audience attracted is only those fluent and

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<sup>413</sup> Biennial Review 2002, *supra* note 4, ¶ 458, at 13800.

<sup>414</sup> *Id.* ¶ 56, at 13638.

<sup>415</sup> *Id.* ¶ 68, at 13641.

<sup>416</sup> See *supra* text accompanying note 394.

<sup>417</sup> See *supra* text accompanying notes 160–61.

<sup>418</sup> See Amend. of pt. 76, *supra* note 162, ¶ 24, at 452.

interested in the language—the Spanish-speaking audience. It is not an accurate measure of an audience if you count the many Americans who do not speak Spanish in the measure of Univision’s audience reach. Univision is not targeting those consumers who don’t speak Spanish, so the FCC should not include them in their analysis of the merger. In fact, the FCC refused to find out if there was an impact on Spanish-speaking audiences.<sup>419</sup> The Congressional Hispanic Caucus asked the Commission to “carefully review the full impact that this merger will have on the Hispanic community,”<sup>420</sup> but the FCC refused.<sup>421</sup> The FCC cannot execute competition and diversity inquiries for English-language audiences alone and still claim the merger is in the public interest.<sup>422</sup> The FCC cannot continue to exclude language from broadcast ownership decisions if diversity and competition are to be accurately measured for all audiences, including Spanish-speaking ones.

The FCC has recognized how different the competitive market is for Spanish-language broadcasters.<sup>423</sup> That concern fueled the special privileges the FCC granted to NBC in 2002 when NBC merged with Telemundo.<sup>424</sup> When ABC merged with Disney, the FCC forced ABC to divest its extra TV station in six months because of concerns over competition and excess control of advertising in the L.A. market.<sup>425</sup> But when NBC faced the same problem, in the same market, it was given twice the time to divest because of the Spanish-language stations involved in its’ merger.<sup>426</sup> Excess concentration and control were not Commission concerns because there was no competition between the NBC and Telemundo stations due to the different language of the broadcasts.<sup>427</sup> It is contradictory to find that NBC would not

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<sup>419</sup> See *supra* text accompanying note 394.

<sup>420</sup> Letter from Rep. Robert Menendez et al., to Chairman Michael Powell, Sept. 17, 2002, at 1, available at [http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6513307688](http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513307688).

<sup>421</sup> See *supra* text accompanying note 394.

<sup>422</sup> See Biennial Review 2002, *supra* note 4.

<sup>423</sup> See *supra* Part I.B.4.

<sup>424</sup> See *supra* text accompanying notes 122–26.

<sup>425</sup> See *supra* text accompanying notes 120–21, 121.

<sup>426</sup> See *supra* text accompanying notes 122, 126.

<sup>427</sup> See *supra* text accompanying notes 124–25.

compete with Telemundo in that merger and then argue that Univision competes with all the other English-language broadcasters in America. Language changes the competitive environment for media companies and the FCC cannot recognize this in 2002, but ignore it in 2003.

## 2. Spanish-Language Community Programming Needs

To exclude language in the Univision merger was inconsistent with prior FCC findings that sought to protect the needs of Spanish-language audiences in other contexts.<sup>428</sup> The FCC has recognized community need and the public benefit of foreign language media on numerous occasions.<sup>429</sup> From the earliest days of broadcasting, the FCC commended beneficial, foreign-language broadcasting in America.<sup>430</sup> The FCC has even demanded foreign-language broadcast service in communities that lack such an outlet.<sup>431</sup> In *La Fiesta*, it selected the broadcaster who would provide a full-time Spanish-language radio service, not the one who would provide a part-time service.<sup>432</sup> In the *KEVT* decision, the Commission admitted that the Spanish-language nighttime radio service was needed in that community and it was willing to waive other rules to provide for the service.<sup>433</sup>

The FCC's longtime "reluctance to define product markets based on programming format or language"<sup>434</sup> is not a valid policy when it results in an abandonment of the regulatory responsibility of protecting the public interest.<sup>435</sup> The Supreme Court approved the FCC's use of the market to regulate entertainment formats, however it cautioned a blanket application of such a rule.<sup>436</sup> The Supreme Court said that "the Commission should be alert to the consequences of its policies and should stand ready to alter its rule

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<sup>428</sup> See *supra* Part I.B.1–5.

<sup>429</sup> See *supra* Part I.B.1.

<sup>430</sup> See *supra* text accompanying notes 68–69.

<sup>431</sup> See *supra* text accompanying notes 80–81.

<sup>432</sup> See *supra* text accompanying notes 72–81.

<sup>433</sup> See *supra* text accompanying notes 102–03.

<sup>434</sup> Univision License Transfer, *supra* note 129, ¶ 58, at \*67.

<sup>435</sup> See *supra* text accompanying notes 92–93.

<sup>436</sup> See *supra* text accompanying notes 92–93.

if necessary to serve the public interest more fully.”<sup>437</sup> Notwithstanding the argument that Spanish-language media is simply a format, the FCC still has the ability and duty to review entertainment format changes to ensure the public interest is served.<sup>438</sup>

More importantly, it cannot be argued that Spanish-language broadcasting is a mere entertainment format when it acts as the primary source of local news for Spanish-speakers.<sup>439</sup> The language of an audience affects information and resource choices more than a musical preference. One can access local news without having to listen to classical music or jazz. As Judge Bazelon stated in the *KEVT* decision: “there is a crucial difference between failure to *serve* a group which cannot understand the language broadcasted, and a failure to *reach* a group which chooses not to listen because of program content.”<sup>440</sup> The FCC has a duty to regulate in the public interest to protect audiences who are not being served. The FCC has a record of protecting Spanish-language audiences who are not being served, but it abandoned this audience when it approved the Univision merger.<sup>441</sup>

### 3. Network Representation Waiver—A Separate Policy for Spanish-Language Broadcasters

The most controversial stance taken by the FCC in this debate is its granting of the permanent waiver of the network representation rule for only Spanish-language broadcasters, even when a judge questioned this practice as anticompetitive and no longer necessary in the public interest.<sup>442</sup> If the waiver of the network representation rule still operates based on the language of the broadcasters, the FCC cannot pretend that the Univision merger existed in a language-neutral marketplace. This waiver is evidence of the already existing separate media marketplace of Spanish-language broadcasting. There is no question that language and

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<sup>437</sup> FCC v. WNCN Listeners Guild, 450 U.S. 582, 603 (1981).

<sup>438</sup> See *supra* text accompanying note 93.

<sup>439</sup> See *supra* text accompanying notes 214, 224.

<sup>440</sup> Tucson Radio, Inc. v. FCC, 452 F.2d 1380, 1383 n.1 (D.C. Cir. 1971).

<sup>441</sup> See *supra* Part I.B.1.

<sup>442</sup> See *supra* Part I.B.4.

advertising competition are central to the FCC's application of the waiver.<sup>443</sup> The FCC, in granting the network representation rule waiver, acknowledged a fundamental difference in the business, advertising, and structure of Spanish-language media as compared to English-language media. These are competitive differences that the FCC does not recognize for any other type of broadcaster. The common thread amongst the waiver recipients is the language of their broadcasts. It is inconsistent to recognize this language distinction in such cases, but not in broadcast ownership decisions.

The waiver is no longer appropriate for Univision, because it was originally issued to assist fledgling entities.<sup>444</sup> In 2003, Univision's profits were \$349 million and it no longer qualifies as fledgling.<sup>445</sup> Univision no longer needs the FCC to support its development and growth in the same way it did in 1978. The waiver was intended to "encourage[e] the growth and development of new networks; foster foreign-language programming; increase[e] programming diversity; strengthen competition among stations; and foster a competitive UHF service."<sup>446</sup> Certainly Univision can no longer argue that it is a new network.<sup>447</sup> Univision, founded in 1961, is the fifth largest network putting it ahead of UPN and the WB.<sup>448</sup> Competition is not served by extending the waiver privilege to Univision. Univision has been so well-protected that the Administrative Law Judge's premonition about the anticompetitive effects of this waiver have come true.<sup>449</sup> Univision argued in defense of the waiver that no other sales representative competed with it and no competitor could take its place if the waiver was lifted.<sup>450</sup> In 1978, there actually was one

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<sup>443</sup> See *supra* text accompanying notes 136, 142, 156.

<sup>444</sup> See *supra* text accompanying note 136.

<sup>445</sup> Bill Carter, *NBC Sees a Crown Jewel in a Spanish-TV Also-Ran*, N.Y. TIMES, July 12, 2004, at C1.

<sup>446</sup> Azteca Int'l Corp.; Petition for Waiver of § 73.658(i) of the Comm'n's Rules, 18 F.C.C.R. 10662, ¶ 3, 10663 (May 23, 2003) (quoting Report and Order for permanent waivers for Univision and Telemundo).

<sup>447</sup> See *supra* text accompanying notes 183–94.

<sup>448</sup> Univision License Transfer, *supra* note 129, at \*86 (Commissioners Adelstein, J. and Copps, M., dissenting).

<sup>449</sup> See *supra* text accompanying notes 148–50.

<sup>450</sup> See *supra* text accompanying note 317.

other sales representative competing with Univision<sup>451</sup> but now Univision alone controls the market. Protected by this waiver, Univision has successfully dominated the market in spot sales for its own affiliates for over 25 years. Faced with this evidence of anticompetitive harm, the FCC still did not withdraw the waiver.

This is a *separate* policy for Spanish-language broadcasters that is not applied *equally* to other broadcasters. Yet it is a policy that Univision seeks to protect, not for itself, but for Entravision, the company it is a competitor of in radio, but an ally with in television.<sup>452</sup> Entravision, as owner of Univision affiliates, should be free to make its own arguments for the benefits of the waiver. The fact that Univision argued for the protection of the rule on behalf of Entravision suggests that Entravision's affiliate independence is questionable. The rule was initially created to prevent this kind of network control over affiliates.<sup>453</sup> Univision does not deserve this unique protection when it claims the language of its broadcasts qualifies it for special privileges in one area of business, but denies that language is a factor when used in a definition for another of its ventures.

This record of FCC decisions demonstrates that language is, and has always been, a factor in FCC decisions and must be taken into consideration when media mergers affect foreign-language audiences. Language affects the market, advertising and competition—all matters that are integral to the broadcast ownership review.

### *B. Unique Use of Spanish-Language Media*

The merger has given the FCC a significant record of studies, statistics, and anecdotes of participants in the market of Spanish-language media that refutes the FCC's conclusion that Spanish-language media functions in the same way as English-language media.<sup>454</sup> Spanish-language media cannot be substituted with English-language media merely because Spanish-speaking

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<sup>451</sup> See *supra* text accompanying note 137.

<sup>452</sup> See *supra* text accompanying notes 313–19.

<sup>453</sup> See *supra* text accompanying notes 131–33.

<sup>454</sup> See *supra* Part II.B.2.



audiences “use” the content differently and because of presentation style and focus.<sup>455</sup> Since the broadcast ownership rules are premised on serving and protecting consumers,<sup>456</sup> the FCC must address how Spanish-language consumers interact with their media.

### 1. Viewpoint Diversity Cannot Include Cable

When one only speaks Spanish or prefers to hear local news in Spanish, ones media choices are automatically limited and that changes the dynamic of viewpoint diversity for a significant portion of the population. The FCC has considered that many different media outlets can contribute to viewpoint diversity including broadcast television, radio, newspapers, cable and the internet.<sup>457</sup> The FCC, however, has said “Not all voices. . . speak with the same volume.”<sup>458</sup> Despite the fact that these sources of viewpoint diversity add to the public’s choices,<sup>459</sup> all these media do not offer the same benefits to consumers<sup>460</sup> nor are they accessible to all people.<sup>461</sup> Since local news programming is the FCC’s indicator of viewpoint diversity,<sup>462</sup> it has concluded that each of these media cannot be considered of equal weight when examining a local news service.<sup>463</sup> Specifically, the FCC found that cable cannot be a complete substitute for broadcast stations and newspapers as sources of local news<sup>464</sup> because one third of Americans are not cable subscribers and only 30% of cable subscribers “have access to local cable news channels.”<sup>465</sup> Those local cable channels only reach 10-15% of cable systems nationwide and of the twenty-two local cable news channels available, five serve the New York City area.<sup>466</sup> The FCC decided

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<sup>455</sup> See *supra* Part I.C.2.b.

<sup>456</sup> Biennial Review 2002, *supra* note 4, ¶ 58, at 13639.

<sup>457</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 403 (3d Cir. 2004).

<sup>458</sup> *Id.* at 408 (*quoting* NPRM, 18 FCC Rcd 13620, 13794 (2003)).

<sup>459</sup> *Id.* at 400.

<sup>460</sup> *Id.*

<sup>461</sup> See *supra* text accompanying notes 227–37.

<sup>462</sup> See *supra* text accompanying note 41.

<sup>463</sup> *Prometheus Radio Project*, 373 F.3d at 400.

<sup>464</sup> *Id.* at 401.

<sup>465</sup> *Id.* at 415.

<sup>466</sup> *Id.* at 405.

that since cable still lacks significant local news options, it is not a trustworthy measure of viewpoint diversity and excluded it from a calculation of market diversity.<sup>467</sup>

In spite of the above facts, the FCC took the stance that a merger of Univision and HBC would not harm market diversity<sup>468</sup> because of the plethora of programming choices available through cable and satellite sources for Spanish-language audiences.<sup>469</sup> It is well known, however, that cable subscriptions rates for Hispanic households are lower than non-Hispanic households.<sup>470</sup> The FCC does not justify how cable overall cannot be a sufficient source of viewpoint diversity, but it can be for Spanish-language audiences who have less access to cable. The FCC rationalized their decision by saying that there would be future cable options for the Hispanic population, but such offerings do not yet exist. There is no justification for the FCC's argument that Spanish-language audiences have enough viewing choices now based upon future, hypothetical programming. The FCC cannot analyze competition and diversity in a market today by counting theoretical programming. The FCC also can't rely on cable as a substitute for free broadcasting when cable subscriptions are far less prevalent in Hispanic households. FCC's rationale to include cable in its calculation of diversity for audiences affected by the Univision merger lacks credibility under this analysis.

## 2. English-Language Programming Just Doesn't Translate

The FCC relied on the availability of SAP to increase programming choices for Spanish-language audiences in the Univision decision.<sup>471</sup> However, statistics have shown that only 42% of Hispanic households are cognizant of SAP's existence and only 1 in 6 of these households use it with any frequency.<sup>472</sup> If no one is using it, then it can't be a substitute for Spanish-language broadcasting, nor a measure for diversity in the Spanish-language

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<sup>467</sup> *Id.*

<sup>468</sup> See *supra* text accompanying notes 402–08.

<sup>469</sup> See *supra* text accompanying notes 404–06.

<sup>470</sup> See *supra* text accompanying notes 232–34.

<sup>471</sup> See *supra* text accompanying note 404.

<sup>472</sup> Higgins, *supra* note 209, at 24.

market. More importantly, SAP only provides access to translated English-language programming, and studies have shown that those translations are not the same thing as programming designed for Spanish-language audiences.<sup>473</sup> This is especially critical when looking at local news.<sup>474</sup> If local news is the barometer of a diverse and competitive media market, and translations of English-language news into Spanish have proved to be unworthy and unwatched,<sup>475</sup> then the Spanish-language audiences are not being served by these English-language broadcasters and cannot be considered part of the marketplace of choices available to Spanish audiences. Just translating English broadcasts into Spanish does not make the news more accessible if the news itself is not pertinent to the viewers. Hispanic audiences prefer Spanish-language news broadcasts.<sup>476</sup> Those broadcasts reflect issues not covered on English-language news.<sup>477</sup> Even Univision itself says cultural preferences for Spanish-language programming are the reason behind Univision's dominance in the Hispanic ratings.<sup>478</sup> The FCC cannot include SAP, which marginally opens up English-language programming to Spanish-language audiences, as a guarantor of market diversity. The FCC improperly included cable and SAP in the market definition used in the Univision merger and in doing so counted improper programming as evidence of diversity and competition in the affected market.

### 3. Advertising Marketplace Differences

The FCC heard from a number of market participants that the advertising market for Spanish-language media revolves around language and not media formats. Ad buyers will move from Spanish-language television to Spanish-language radio based on price changes, but will not move from Spanish to English or English to Spanish in any media.<sup>479</sup> Even the DOJ, which only analyzed how the merger would lessen market competition,

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<sup>473</sup> See *supra* text accompanying notes 215–16, 223–24.

<sup>474</sup> See *supra* text accompanying note 218.

<sup>475</sup> See *supra* text accompanying notes 209–18.

<sup>476</sup> Higgins, *supra* note 209, at 24.

<sup>477</sup> See *supra* note 218 and accompanying text.

<sup>478</sup> Chunovic, *supra* note 191, at 16.

<sup>479</sup> See *supra* text accompanying notes 338–39.

defined the market in Univision as Spanish-language radio advertising.<sup>480</sup> Language was a critical factor used to assess the actual behavior of advertisers in the market and to analyze the potential harm for the market. The DOJ found that advertisers did not consider Spanish-language radio to be a “reasonable substitute” for non-Spanish-language radio.<sup>481</sup> The DOJ recognized that language is the linchpin between media advertising habits and actual market competition and it is an erroneous decision for the FCC to find differently.

#### 4. Univision is the Market Leader—Now and Always

Univision admits “that there is no company as dominant in English-language media as Univision is in Spanish.”<sup>482</sup> No other competitor even approaches the market position that Univision held before the merger and certainly not after the merger.<sup>483</sup> The FCC was not troubled by this fact. It allowed this clear market leader to grow and did not apply any limiting conditions to the merger. The market was initially concentrated and this merger only caused this market to further shrink. In the top ten Hispanic markets, there are on “average 3.3 television stations, 5.7 AM stations and 6 FM stations.”<sup>484</sup> “There is no daily Spanish-language newspaper in fourteen of the top twenty Spanish-language markets.”<sup>485</sup> These limited options were what the FCC said constituted a diverse and competitive market for Spanish-language audiences. The FCC did not concern itself with the loss of a voice from this market, because the FCC refused to even view it as a market.<sup>486</sup>

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<sup>480</sup> See *supra* text accompanying note 246.

<sup>481</sup> See *supra* note 246 and accompanying text.

<sup>482</sup> Mireya Navarro, *As Univision Looks to Buy Into Radio*, N.Y. TIMES, June 23, 2003, at C8.

<sup>483</sup> Dawn Wotapka, *Univision's Earnings More Than Double*, L.A. TIMES, Aug. 5, 2004, at C5 (noting Univision's quarterly growth in radio, television, publishing, and music divisions).

<sup>484</sup> Univision License Transfer, *supra* note 129, at \*123 (Commissioners Adelstein J., and Cops M., dissenting).

<sup>485</sup> *Id.*

<sup>486</sup> See *supra* text accompanying notes 393–406.

The Commission argued that the market was not dangerously concentrated because radio market entry was easy. It cited as evidence the number of stations which went from English broadcasting to Spanish.<sup>487</sup> It failed to note, however, that Spanish-language incumbent broadcasters conducted most of those conversions and<sup>488</sup> new entrants were not involved.<sup>489</sup> Thus, this concentrated market remains so following the merger.

### *C. The Univision Decision Must Be Challenged*

The Univision decision cannot be allowed to rest quietly in the annals of FCC history. It should be challenged so that this situation does not happen again. Even though the lawsuit raised by NHPI to the D.C. Circuit failed for standing,<sup>490</sup> the decision should be disputed. Consolidation in Spanish-language media is already significant and the next merger that seeks FCC approval could be the death-knell for a truly diverse and competitive media market if the FCC continues to ignore the question of how language affects competition and diversity. Spanish-language media is only the first stage of this fight.

As local foreign-language communities flock to more foreign-language programming, these issues will continue to arise.<sup>491</sup> As foreign-language communities grow, Congress will have to take notice.<sup>492</sup> The FCC should anticipate that these issues are not

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<sup>487</sup> See *supra* text accompanying notes 407–08.

<sup>488</sup> *United States v. Univision Communications Inc.*, No. 1:03-CV-00758, ¶ 27 (Mar. 26, 2003), available at <http://www.usdoj.gov/atr/cases/f200800/200878.htm> (Complaint for Injunctive Relief) (last visited Nov. 10, 2004).

<sup>489</sup> *Id.*

<sup>490</sup> *Nat'l Hispanic Policy Inst., Inc. v. FCC*, 2004 U.S. App. LEXIS 8121 at \*3 (D.C. Cir. Apr. 22, 2004) *reh'g en banc denied*, *Nat'l Hispanic Policy Inst., Inc. v. FCC*, 2004 U.S. App. LEXIS 16393 (D.C. Cir. Aug. 9, 2004) (unpublished).

<sup>491</sup> See Barry Newman, *Cultural Oases: For Asians in U.S., Mini Chinatowns Sprout in Suburbia*, WALL ST. J., Apr. 28, 2004, at A1 (discussing the changing immigration patterns of Asian communities from the coasts inland and the Chinatown shopping districts that have sprung up to serve local consumers); KRCA License Corp., 15 F.C.C.R. 1794, ¶¶ 20–21, at 1812 (1999) (addressing the independent foreign-language broadcast television service that was of concern for both Spanish and Asian communities in California).

<sup>492</sup> See Ballve, *supra* note 194, at 20 (describing how the Univision merger triggered the partisan politics of Washington); David Rennie, *38m Hispanics Take Over as the Biggest US Minority*, DAILY TELEGRAPH (LONDON), June 20, 2003, at 15 (discussing how Capitol

fleeting and will likely occur with increasing frequency as foreign-language media in America matures with its audiences.

*D. Broadcast Ownership Rules Must Take Language into Consideration*

The FCC should use the filings made to the Commission on the Univision merger to issue a Notice of Proposed Rulemaking and directly address the question of whether Spanish-language media should be regulated as a distinct media market. Spanish-language media today is concentrated in a few companies, further consolidated by the Univision merger. Media consolidation is not the goal of the broadcast ownership rules. Media regulation is supposed to maintain a diverse and competitive media environment.<sup>493</sup> The FCC has failed to do so for Spanish-language media.

The next quadrennial review would be the perfect vehicle for this endeavor. The 2002 biennial review has been remanded to the FCC and the reasoning the FCC used to design the new rules and approve the Univision merger needs serious repair.<sup>494</sup> It would make the most sense to develop a study of Spanish-language media in tandem with the broadcast ownership structure and rules so that competition, localism and diversity are truly protected for all audiences.

This change in the market definition of broadcast ownership rules would not result in dominant English-language companies asserting their influence on two levels, by purchasing both broadcast properties in English-language media and Spanish-language media. New rules should be promulgated so that the FCC looks to Spanish-language concentration on the local level and at the same time maintains a national cap on audience reach that would include both Spanish and English-language media. The rule should promote truly new entrants in the market and not encourage a company at the outer limits of ownership in the

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Hill Republicans have been flocking to Spanish-language classes and learning phrases such as "Necesito su vota" ("I need your vote").

<sup>493</sup> See *supra* text accompanying note 16.

<sup>494</sup> See *supra* text accompanying notes 44–48.

English-language market to expand into Spanish-language media. The Commission should set a diversity and concentration value for Spanish-language stations when the broadcaster has English-language holdings, and when the broadcaster only has Spanish-language stations. The goal of these new rules should be to protect Spanish-language audiences against media consolidation in Spanish outlets. Within these rules however, English-language media giants should not be permitted to skirt overall ownership limits and grow bigger with Spanish-language holdings.

The new rules should allow companies with culturally relevant programming in the Spanish-language market to develop a business on par with English-language companies, even with the application of a market definition based on language. But these companies must realize that media consolidation is not the exclusive domain of the English-language market. If a company chooses to enter the Spanish-language market, its ownership control must be monitored so that the public interest benefits that run to its Spanish-speaking consumers can be determined.

#### CONCLUSION

The FCC should revise its media ownership rules to allow for language as an element of its formula to assess competition, localism and diversity in the public interest. The Commission has a duty and an obligation to all Americans to act in the public interest when regulating the broadcast spectrum. Spanish speakers deserve equal treatment and consideration from a Commission that congratulates itself on its noble goals of competition, localism and diversity. These goals should apply equally to all.